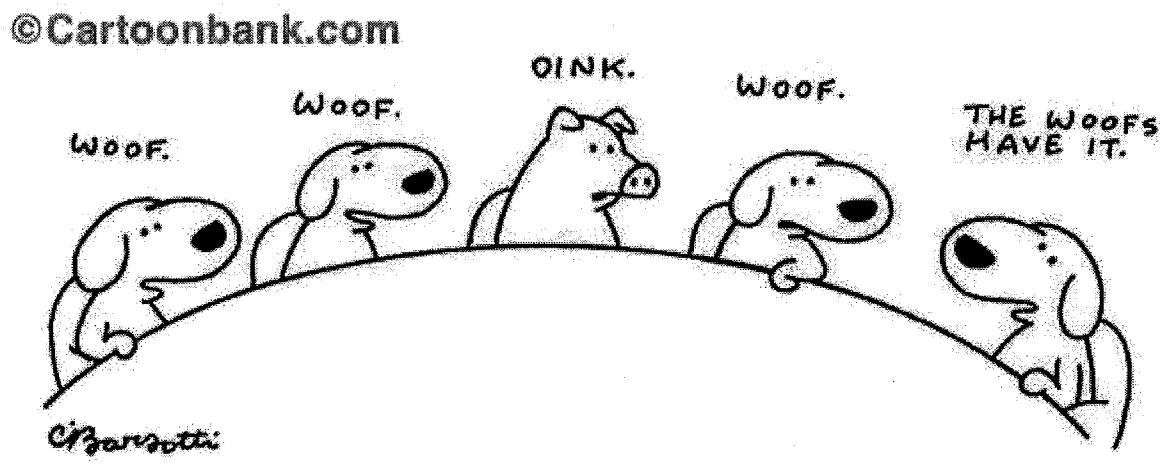
AGENDA FOR TEXCOM MEETING
TRUST AND ESTATES SECTION, STATE BAR OF CALIFORNIA
SATURDAY, JUNE 6, 2009, 9:30 A.M. – 3:30 P.M.
SFO WESTIN



I. WELCOME, REPORTS OF CHAIR AND SECTION ADMINISTRATOR (15-20 Minutes)

A.	Welcome	TONG
B.	Approval of Minutes of the April 24-26, 2009, Meeting	TONG
C.	Report of the Chair	TONG
D.	Report of the Vice Chair	HORTON
	1. Finance Report	
	2. 2009-2010 Meeting Schedule	
E.	Report of the Section Liaison	ORLOFF
F.	Report from the Council of State Bar Sections	STERN
G.	Report from the Chair of the Nominating Committee	STERN

II. LEGISLATION REPORT AND DISCUSSION – CHAIR COREY/EHRMAN (30 minutes)

A. REVIEW OF LEGISLATION

1. 2009 T&E Proposals approved by the BOG [SEE BILLS BELOW]
   - *a) T&E 2009-08 (Collection of Personal Property in Estate by Sister State Personal Representation without Ancillary Administration*
   - *b) T&E 2009-09 (Trustee's Duty to Inform Beneficiaries: Clarification and Expansion)*
   - *c) T&E 2009-10 (Trustee Notification)*

B. Approved Projects

1. T&E 2010-1 (Probate Code section 1470 - Appointment of Counsel)
2. T&E 2010-2 (Change to Statutory Will form)
3. T&E 2010-3 (Increases to Summary Proceeding limits)
4. T&E 2010-4 (Statutory Power of Attorney fix)

C. IMPORTANT GUIDELINES FOR BILL TRACKING

1. Please use approved format for legislative proposals.
2. Please use approved comment form for legislation comments.
3. Always send your comments or position papers to Saul and Jennifer and not directly to a member of the legislative staff or author.
4. Online Bill Tracking legislative information: www.leginfo.ca.gov/ [GO TO THIS SITE FOR TEXTS OF ANY BILLS THAT HAVE NOT BEEN UPLOADED TO THE AGENDA PACKET] and capital tack (See Legislation Committee Workroom Folder & Legislative Matrix)
5. Coordinate contacts with Legislative staff and testimony with the Legislative Chair, Saul and Jennifer.

D. Review of bills from the 2009-2010 Legislative Session

1. CLRC
   - a) SB 105 (Harman) - Donative Transfers — HORTON
   - b) SB 1163 (Tran) –Decedent's Estates — HORTON

2. ESTATE PLANNING
   - a) AB 372 (Ma) – Birth records; adoptees
   - b) AB 442 (Arambula) - Notaries — SCHENONE
   - c) AB 724 (Devore) - Revocable TOD Deeds — ITO
   - d) AB 898 (Lieu) – Notaries — SCHENONE
   - e) AB 1132 (Jones) – Organ Donation — RICHARDS
   - f) SB 98 (Calderon)- Viatical Settlements — HOWARD
   - g) SB 237 (Calderon) – Real Estate Appraisers — RICHARDS

3. INCAPACITY
   - a) AB 82 (Evans) – Dep. children.; psychotropic meds — LODISE
   - b) AB215 (Feurer) – Long-term health care facilities — BELTRAN
   - c) AB 329 (Feurer) - Reverse mortgages — BURNS
   - d) AB 416 (Block) – Developmentally disabled – prevention of abuse — LODISE
   - e) AB 681 (Hernandez) - Confidentiality of psychiatric information — LODISE
   - f) AB 768 (De La Torre) - Elder Abuse; changes to Penal Code — COREY
   - g) AB 989 (Block) -Senior Insurance; actions against insurers
   - h) SB 92 (Aanestad) – Health Care reform — LODISE
   - i) SB 344 (Strickland) – Crimes against elders — COREY
   - j) SB 660 (Wolk) – Reverse Mortgages — BURNS
   - k) SB 661 (Wolk) – Residential care facilities – admissions — COREY

l) SB 819 (B&P Comm) – Professions; licensing MATULICH

4. CONSERVATORSHIP WORKING GROUP

a) AB 276 (Hayashi) – Professional Fiduciaries MATULICH

b) SB 308 (Harman) – Professional Fiduciaries MATULICH

5. INCOME AND TRANSFER TAXES

a) AB 103 (De Leon) – Property taxation; CIO PHARIES

b) AB 129 (Ma) – Confidentiality: taxpayer comm.. JAECH

c) AB321 (Niello) – Property tax base year values PHARIES

d) AB1545 (Rev & TaxComm) – UPIA CRICKARD

e) SB 274 (Dutton) – Property tax: base year values PHARIES

f) SCA 11 (Dutton) – Property taxation: base year value PHARIES

6. TRUST AND ESTATE ADMINISTRATION

a) AB 355 (Ammiano) – Decedents estates: sister state personal representative (T&E 2009-10) HENDEN

b) SB 40 (Correa) – Personal information: SSNs GERSON

c) SB 276 (Harman) – Nonprobate transfer: comm prop) SCHENONE

d) SB 367 (Harman) – Duty to report; notice (T&E 2009-8, 9) HAND

COMMITTEE REPORTS

III. ESTATE PLANNING – Chair SIL REGGIARDO (25 minutes)

A. Repeal of Rule Against Perpetuities HAYES

B. Estate of Powell fix REGGIARDO

IV. TRUST AND ESTATE ADMINISTRATION – Chair MARGARET HAND (25 minutes)

A. Section 16350 Hasso v. Hasso project SCHENONE

B. Directed Trusts HAYES

C. Publication project HAND

V. INCOME AND TRANSFER TAX – Chair JEFF JAECH (5 minutes)

A. Eagle Lodge West project on trust income tax — HAYES

VI. NCCUSL - Chair NANCY HOWARD (1 minute)

A. Uniform Guardianship Law — STERN

B. Changes to UPIA — HOWARD

VII. ETHICS - Chair MEG LODISE (2 Minutes)

A. ABA 1.14 & RULES Revision Commission — LODISE

VIII. INCAPACITY – Chair MEG LODISE (5 minutes)

A. Professional Fiduciaries Bureau – developments — MATULICH

IX. CONSERVATORSHIP WORKING GROUP – Chair ED COREY (15 minutes)

A. Judicial Council Forms – request for comment — COREY

1. SPR-09-43 (Valuation of estate property for bonds)
2. SPR-09-44 (Guidelines for probate examiners and court investigators)

X. CONFERENCE OF DELEGATES – Chair MARC SALLUS (3 minutes)

A. Counterarguments for CDCBA Resolutions

XI. EDUCATING SENIORS – Chair MARC SALLUS (10 minutes)

A. Use of AMA Funds — SALLUS

B. Speakers Bureau Reorganization & Training — SALLUS

XII. TECHNOLOGY – Chair DAVID GAW (10 minutes)

A. E-News — GAW

B. Workroom issues — HENDEN

C. Members webpage content review — HENDEN/REGGIARDO

XIII. EDUCATION – Chair BART SCHENONE (15 minutes)

A. Programs for San Diego Annual Meeting — SCHENONE

B. Stand Alone Programs — SCHENONE

1. Sophisticated Estate Planning – April 17, 2009
2. The Legal Specialization Exam and You– June 26, 2009

3. Pass Through Entities 2010

C. Your Legal Rights — SCHROFF
   1. Upcoming Programs in 2009

D. CEB Programs for 2009-2010 — GOOD

XIV. EADE – Co-chairs JOHN HARTOG and NEIL HORTON (15 minutes)

XV. CLRC – Chair DAVID BAER (15 minutes)

A. Disqualified Fiduciaries — BAER

XVI. LITIGATION – Chair DAVID BAER (30 minutes)

A. Evidentiary hearings for probate proceedings — BAER
B. Probate Code section 15804 (Virtual Representation) — BAER
C. Mediation in probate proceedings — EPSTEIN
D. Proposed rule – fiduciary self-representation — HORTON

XVII. MEMBERSHIP AND MARKETING – Chair BECKY SCHROFF (2 minutes)

A. Membership Count
B. CLE Brochure

XVIII. QUARTERLY – Executive Director: PHIL HAYES; Editor: ANDY ZABRONSKY (2 minutes)

A. Winter issue
B. Spring issue deadlines
   1. Manuscripts – February 1, 2009
   2. Advertising & Alerts – March 1, 2009
C. Summer issue deadlines
   1. Manuscripts – May 1, 2009
   2. Advertising & Alerts – June 1, 2009
D. Fall issue deadlines
   1. Alerts - August 1, 2009
   2. Advertising & Alerts – September 1, 2009

XIX. NEW BUSINESS

XX. UPCOMING ATTRACTIONS

A. THE CERTIFICATION EXAM AND YOU – June 26, 2009 (Sofitel, Redwood City)

B. THE LAW AND ELDER ABUSE – San Diego (October 9, 2009) and Sacramento (October 20, 2009)

C. STATE BAR ANNUAL MEETING – September 13, 2009

Executive Committee
Trusts and Estates Section
State Bar of California
Del Mar, California
April 24-26, 2009

Members Present: May Lee Tong (Chair), Neil F. Horton (Vice-Chair), David W. Baer, Shannon Burns, Jeremy B. Crickard, Richard L. Ehrman, Bette B. Epstein, Michael Gerson, Nancy E. Howard, Patrick Kohlmann, Jayne C. Lee, Barry K. Matulich, Andrew Pharies, Marc Richards, Marc L. Sallus, Bart J. Schenone, and Rebecca L. Schroff.

Members Absent: None.

Advisors Present: Thomas E. Beltran, James J. Brown, Jr., Edward J. Corey, Jr., David B. Gaw, Margaret M. Hand, John A. Hartog, Philip J. Hayes, Kay E. Henden, Charlotte K. Ito, Jeffrey A. Jaech, Margaret G. Lodise, Tracy M. Potts, Silvio Reggiardo III, Peter S. Stern, and Andrew Zabronsky.

Advisors Absent: Adam F. Streisand.

Others Present: Don E. Green (Judicial Liaison), Saul Bercovitch (Legislative Counsel – by telephone), Jennifer Wada (Legislative Advocate – by telephone), Leonard W. Pollard II (Reporter), Carmen Alberio (EADE Committee Member), and Susan Orloff (Section Administrator).

I. WELCOME — TONG

Chair Tong welcomes TEXCOM to her 2009 Retreat at the L'Auberge Del Mar.

A. Approval of Minutes 3-14-09 — TONG

At page 1, in Advisors Present, the term "(by telephone)" is removed after the names of Mr. Corey and Mr. Stern; at page 11, item 6 "b" reference is to SB 1163; at page 15, item XIII, line one "Descendant" should be "Decedent"; otherwise, the Minutes are unanimously approved.

B. Announcement of Activities — ORLOFF, PHARIES, STERN

Mr. Stern comments on his Death March VI to ascend Mt. Woodson, hiking from approximately 1,000-2,900 ft. with superb views as the reward. A second possible outing is a hike at the Torrey Pines Reserve, which is approximately 20 minutes from the hotel. It involves a relatively small amount of walking in picturesque scenery. In a handout describing these two hikes, Mr. Stern cites descriptions in Jerry Schad's Afoot and Afield in San Diego County (Wilderness Press, third edition). As Mr. Schad notes, the south flank of Mt. Woodson begins a "rollercoaster like

descent" around huge boulders and through brush. The trail is rough and may not be well maintained. As is obvious, Mr. Stern prepares for his hikes the way he prepares for trial, in a thorough fashion.

For those interested in golf, Mr. Pharies can make the arrangements.

C. Report of the Vice Chair **HORTON**

1. Finance Report

Mr. Horton says he will post the latest financial report in the workroom. Our virtual account has increased by $50,000. We have items of miscellaneous revenue, including revenue from programs, as well as $13,000 income from webinars, pursuant to our 60-40 split with the State Bar.

D. Report of the Section Liaison ORLOFF

Ms. Orloff reminds TEXCOM to submit our expense reports for this meeting by May 26th, providing original receipts for expenses over $25.

Addressing the upcoming annual meeting in the Fall, Ms. Orloff says it will be held at the Hyatt. As is customary, our new member orientation is on Saturday from 1 to 5, with a TEXCOM dinner in the evening (probably at Mr. A's), and our meeting on Sunday. Mr. Sallus notes that the Los Angeles and Beverly Hills local bars did seek a hotel change from the Hyatt; and he adds that the San Francisco Bar will boycott the Hyatt. As noted previously, the owner of the Hyatt contributed $100,000 to the "Yes on 8" campaign, with which some groups expressed concern. We might expect fewer people at our MCLE programs, and we should advise the speakers of the meeting location. Apparently the California Supreme Court is scheduled to rule on the challenge to Proposition 8 on June 5, 2009.

Ms. Orloff agrees, saying the State Bar has reduced the number of MCLE programs and does expect a lower attendance. Mr. Matulich notes that the Hyatt is not unionized and is on a union "Do not patronize list." He asks if we could meet at a law office in San Diego, instead of at the Hyatt. Ms. Orloff says "no," because the State Bar would not reimburse for meetings elsewhere and she could not attend. In better news, Ms. Orloff notes that the Section has made $13,000 in the first quarter of 2009 from online programs; and the video taping of MCLE programs can lead to more webinars.

E. Report from the Council of State Bar Sections STERN

Mr. Stern references a handout- an April 17, 2009 memo to Council of State Bar Sections from the Council Officers re Discussion Points Relating to the "Find a Lawyer" Project. Mr. Stern says that Pam Wilson (State Bar) needs our prompt feedback. He will send in a report on Monday, so please give him your comments.

As background, a presentation was made to the Council on August 11, 2008, on a proposed new "Find a Lawyer" search engine that would be made available through the State Bar website. A taskforce was created to address concerns raised by local bars and the Lawyer Referral Services.

The Council Officers believe that the proposed new system is similar to the existing system with two exceptions: "(1) It offers slightly expanded Bar member profiles; and (2) it provides much greater exposure for Legal Aid and Lawyer Referral Services. As discussed at the April 8th meeting, those services represent only 5,100 attorneys out of over 160,000 attorneys statewide.

Mr. Sallus says the voluntary bars have lawyer referral services that are regulated by the State Bar. Referenced attorneys must have specified experience and pay a fee. The voluntary bars view the initial proposal as competition by the State Bar. Ms. Orloff adds that the posted attorney profiles would not be vetted. As noted, Mr. Stern will send in a report on Monday, so please give him your comments.

Our Section Bylaws. Mr. Stern says that we amended our Bylaws last year, and last July the Board of Governors approved those Bylaw changes. Handouts include a June 12, 2008 memo to Board Committee on Member Oversight from Tricia Horan, Manager, Section Education and Meeting Services re Trusts and Estates Section Bylaw Change. A second handout is Bylaws of the Trusts and Estates Section. And the changes are referenced in section 4 "Executive Committee," which newly references electronic communication, as well as the telephone.

II. CONFERENCE OF DELEGATES – Chair MARC SALLUS

A. Resolutions

Quite a large number of probate-related resolutions involved the Conference of Delegates of California Bar Associations ("CDCBA") this year, including 12 Series 12-Probate & Trusts resolutions. Mr. Sallus will summarize each resolution. If someone wishes to take a position, then say so. Otherwise, Mr. Sallus may simply move on. If we do oppose a resolution, then our due date to provide counter arguments to influence the CDCBA Resolutions Committee is May 22, 2009. The CDCBA will meet at the Hilton in San Diego. Probate items are scheduled last, to be heard on Sunday morning. Our delegates to the conference are Mr. Schenone and Mr. Matulich. Mr. Sallus comments, for future TEXCOM delegates, that joining a local delegation to influence their positions is a good idea.

Resolution 05-02-2009. Prenuptial Agreements: Prospective Application of Family Code Section 1615.

In 2001, Family Code section 1615 was amended to specify certain requirements for a premarital agreement to be valid. Apparently, section 1615 is being applied retroactively to invalidate a great number of premarital agreements entered into in good faith by the parties prior to December 31, 2001. Resolution 05-02-2009 would provide that the 2001 amendment is prospective only. TEXCOM has no comments.

Resolution 05-03-2009. Actions for Nullity of Marriage after Death.

Family Code section 2211 allows for annulment of a voidable marriage during life based on facts such as unsound mind, fraud, force, etc. Section 2211 does not provide for an action to annul a marriage following a person's death. Creative caregivers may marry an elderly person for whom they provide care, and then any testamentary gift to the caregiver is not presumed to be obtained through undue influence under Probate Code section 21350, et. sec. This proposal would amend section 2211 to allow an "interested person" to bring an action to annul a voidable marriage following the death of the party on specified grounds.

Mr. Sallus says this proposal would change the law and might impact us. Should we take a position? Ms. Howard notes that the proposal makes sense regarding elder abuse, and it would certainly impact the marital deduction. Mr. Schenone promptly moves to support Resolution 05-03-2009 in principle. Ms. Lodise nods in agreement, saying it is a good idea. And while a tax issue certainly exists, the challengers would not be concerned. Mr. Green observes that we actually sponsored a proposal like this some years ago.

Mr. Crickard observes a small window of opportunity may exist to challenge a bequest after death; and Ms. Lodise notes the one-year limitations period. She has handled conservatorships involving a race to the courthouse to nullify a marriage before death. TEXCOM votes on Mr. Schenone's motion to support Resolution 05-03-2009 in principle.

TEXCOM action: Aye - 16; Nay – 1; Abstain – 8.

Mr. Sallus says he will take up the following resolutions as a group: Resolution 05-04-2009; Resolution 05-09-2009; and Resolution 05-15-2009.

Resolution 05-04-2009. Constitutional Amendment: Repeal of "California Marriage Proposition Act." It would redefine marriage as being between two people, not a man and a woman.

Resolution 05-09-2009. Family Law: Right to Remarry in California. Existing California law requires that parties who want to marry must be "unmarried." This has been interpreted to mean that two people cannot marry in California if they are already married in another jurisdiction. For example, the marriage certificate may be in Spanish, and the couple wishes it be in English.

Resolution 05-15-2009. Civil Unions Defined. This proposal would replace the term "Marriage" with the term "Civil Union."

Mr. Sallus says these proposals may impact our practice; however, we should not take a position because of "Keller" issues. Nevertheless, we could respond individually. Mr. Ehrman asks if we could take a position because these proposals impact our estate planning practice. Mr. Sallus responds that such a position would be fraught with danger. Less concerned with danger, Mr.

Hartog says these proposals would reverse 300 hundred years of American law. This is a revolution, not evolution. We should oppose the proposals. When no second is forthcoming, Mr. Horton moves that we take no position on these proposals. Joining Mr. Ehrman, Mr. Pharies notes that these proposals do impact tax issues. TEXCOM votes on Mr. Horton's motion to take no position.

TEXCOM action: Aye – 22; Nay – 1; Abstain – 1.

Resolution 05-05-2009. Marital Property: Revocable Estate Planning Documents Not Evidence of Transmutation.

Mr. Bercovitch says this proposal comes from FLEXCOM. It seeks to reverse the ruling *In re Marriage of Holtemann* (2008) 166 Cal. App. 4th 1166. That case held a transmutation agreement, prepared in conjunction with a revocable trust, was effective upon dissolution.

Mr. Schenone says the wording bothers him because some revocable trusts do determine the character of property, so he cannot support the proposal. Mr. Stern agrees, and makes a motion to oppose Resolution 05-05-2009. Ms. Lodise agrees with Mr. Schenone and Mr. Stern. Additionally, this proposal creates a trap for the unwary. Mr. Horton nods in agreement, saying a revocable trust may include two or more people speaking. Mr. Hartog says *Holtemann* was correctly decided. One cannot toggle documents on and off. TEXCOM votes on Mr. Stern's motion to oppose Resolution 05-05-2009.

TEXCOM action: Aye – 25; Nay – 0; Abstain – 1.

Mr. Hartog is draft to write the counter arguments.

Resolution 05-16-2009. Paternity Records: Confidentiality.

This proposal would revoke confidentiality of public paternity records in the Family Code. Mr. Sallus says this proposal has come up before. Mr. Matulich suggests that we take no position.

Resolution 09-01-2009. Termination of Deposit of Estate Planning Document.

Probate Code section 732 allows an attorney to terminate the deposit of estate planning documents by providing notice to the depositor's last known address, where the depositor has failed to reclaim the document within 90 days. This Resolution would allow the attorney to destroy the document or, alternatively, to transfer it to the superior court clerk. Mr. Sallus says this proposal came up in 2008, stirring up quite a bit of opposition. In fact, Mr. Birnberg has his opposition argument drafted already. Last year, the proposal was pulled. Ms. Lodise moves to oppose the proposal, saying she does not like the destruction of documents. Mr. Stern agrees with Ms. Lodise. But what above having an active attorney deposit documents with the superior court clerk if the attorney does not have the ability to contact the client? Chair Tong says we

might ask the Estate Planning Committee to address the issue, but not in this vehicle. In a glance which surveys the group, Ms. Lodise asks if anyone in the Estate Planning Committee is concerned with this issue. And she receives no responses. Ms. Potts says the issue includes a matter of privacy that the client expects.

TEXCOM votes on Ms. Lodise's motion to oppose Resolution 09-01-2009.

TEXCOM action: Aye – 25; No – 0; Abstain – 1.

Ms. Lodise will write the counter argument.

Notice of Trust Revocation.

Mr. Sallus says both Resolutions 12-01-2009 and 12-10-2009 involve providing notice upon revocation of a trust, and both address *Masry v. Masry* (2008) 166 Cal. App. 4th 738. The appellate court held Probate Code section 15401 permitted one spouse to revoke a revocable trust containing community property by giving notice to himself, and that he did not need to give notice to his then wife, the other trustee. Only after the husband died did the wife find out he had revoked the trust.

Resolution 12-01-2009. Revocation of Trust-Notice to Trustees.

This resolution would amend section 15401 to require notice in writing signed by the settlor and "contemporaneously" delivered to "all trustees and settlors."

Ms. Potts asks what "contemporaneously" means. She has spouses who literally and physically reside a world apart. Mr. Crickard promptly moves to oppose Resolution 12-01-2009, saying it should not include notice to trustees.

TEXCOM action: Aye – 25; Nay – 0; Abstain – 0.

Mr. Crickard will prepare the counter argument.

Resolution 12-10-2009. Notice of Trust Revocation to Other Settlor(s)

Mr. Sallus cautions that we should not give this proposal overwhelming support just because it was authored by former Chair Valerie Merritt. This proposal would amend section 15401, sub-section (b), to provide that, unless otherwise provided in the instrument, each settlor may revoke a trust "so long as notice of the revocation is given to the other settlor(s) within (10) days of the revocation."

Mr. Schenone asks what happens if the notice is not provided within 10 days. Mr. Sallus responds that both this proposal, and the prior proposal, beg that question. Mr. Schenone moves to oppose Resolution 12-10-2009.

TEXCOM action: Aye – 22; Nay – 1; Abstain – 4.

Mr. Schenone is to prepare the counter argument and reference begging the question. We recognize, of course, that Ms. Merritt could revise this proposal.

Mr. Hartog asks how many agree with the *Masry* policy. And what is the difference between a trust and a will in this context? Chair Tong refers these questions to the Estate Planning Committee for a report.

Resolution 12-02-2009. Surcharge and Additional Damages Recoverable From Agent under Power of Attorney.

Mr. Sallus notes that the Probate Code does not specifically provide for the liability of an attorney-in-fact. Resolution 12-02-2009 would make the attorney-in-fact liable to the same extent as other fiduciaries under the Probate Code. Mr. Schenone quickly moves to oppose this proposal because it takes away a safe harbor for the uncompensated attorney-in-fact, who is not liable for loss to the principal's property unless the loss results from the attorney-in-fact's bad faith, intentional wrongdoing, or gross negligence. But Mr. Matulich counters that he never liked that safe harbor. What does "uncompensated" mean? The issue is whether wrongdoing occurred. Mr. Stern parries that the safe harbor is intended for the non-professional "Good Samaritan." Mr. Corey, in contrast, thinks the proposal is fine. Sensing a brewing floor fight, Mr. Schenone withdraws his motion and TEXCOM takes no position on this resolution.

Resolution 12-03-2009. Revocable Trusts: Court Order Required to Enforce Claims.

Unhesitatingly, and without discussion, Mr. Schenone asserts "Kill it; you need a judgment to seize property." That curt statement is understood as a motion to oppose Resolution 12-03-2009.

TEXCOM action: All oppose the resolution.

Mr. Schenone will write the counter argument.

Resolution 12-04-2009. Elder Abuse: Standing to Seek Protective Order.

This proposal would confer standing to seek a protective order on an elder or dependent adult's conservator or, if there is no conservator, essentially on any interested person. Mr. Matulich announces that he does not like the proposal. Probate Code section 2462 already authorizes a conservator to bring an action for a conservatee, so this proposal contains unnecessary language. Mr. Stern is concerned that the term "interested person" is very broad. Rhetorically, Mr. Green asks if we would wish to give standing to any child of the elder. And Ms. Lodise promptly moves to oppose resolution 12-04-2009.

TEXCOM action: Aye – 26; Nay – 0; Abstain – 0.

Mr. Green will write the counter argument.

Resolution 12-05-2009. Abducted Adult: Standing to Bring Action for Return.

This proposal first assumes that an elder or dependent adult has been abducted from this state. And the question is who has standing to bring an action for return of the elder or dependant adult to this state, and for damages and for other relief. This proposal would allow the conservator, or if none, then any interested person to have standing to bring such action. Mr. Sallus asks who will move to oppose this proposal which allows "any interested person" to initiate such proceedings. Ms. Lodise accommodates Mr. Sallus, moving to oppose Resolution 12-05-2009 as being overbroad.

TEXCOM action: Aye – 9; Nay – 1; Abstain – 16.

TEXCOM ponders the consequences of this unusual vote momentarily. Then Mr. Sallus says "The motion passes." Ms. Lodise volunteers to do the counter argument, noting that the impact of the proposal is not clear.

Resolution 12-06-2009. Nonprobate Transferors: Revocable Transfer upon Death Deeds.

Mr. Schenone says this resolution is different than the legislative proposal involving revocable transfer on death deeds. This proposal is very crude. Mr. Hartog agrees. He says this proposal is like a case several years ago where a daughter signed a grant deed for a father, who was in a different room. Mr. Green says the CJA Committee voted to oppose this resolution because it would create litigation and confusion – i.e., it would make the world worse. Mr. Schenone moves to oppose resolution 12-06-2009.

TEXCOM action: Aye – 23; Nay – 0; Abstain – 2.

Ms. Potts will write the counter argument.

Resolution 12-07-2009. Paralegal Fees Recoverable as Fees by Professional Fiduciaries.

This proposal would permit the conservator or guardian to recover for employee or staff time spent on conservatorship or guardianship matters, which matters are performed under the fiduciary's supervision. Mr. Schenone says this proposal is just too broad. Ms. Lodise adds that she is not aware of a problem. Professional fiduciaries ask for fees for their staff all the time and courts routinely grant it. But things are different in Napa County, Mr. Gaw says. A judge declined to give compensation for time spent by a law office paralegal; he favors the proposal. Mr. Horton says the proposal is deficient in its language. It does not define "staff" and it does not

require that services be to the benefit of the ward or conservatee. A motion is made to oppose this resolution 12-07-2009.

TEXCOM action: Aye – 2; Nay – 20; Abstain – 5.

The motion fails, and TEXCOM takes no position.

Resolution 12-08-2009. Probate: Hearsay Exception for Wills and Trusts.

Existing law provides a hearsay exception for a decedent's statements when living that are probative as to the existence or nonexistence of a will. This proposal would expand the hearsay exception to include revocable trusts as well as wills. Mr. Sallus asks if anyone wants to take a position on this proposal. No one responds.

Resolution 12-09-2009. Probate: Presumptions of Revocability for Trusts with Multiple Settlor's.

Mr. Hartog says this proposal would revise California law. Ms. Lee observes that this is an *Estate of Powell* issue. Another proposal by former Chair Valerie Merritt, this proposal would add Probate Code section 15400.5 to provide:

"If two or more persons establish a joint trust, each is a settlor as to that person's own contributed property. Upon the death of the first settlor to die (or any settlor other than the last settlor to die), unless the trust instrument expressly provides otherwise, the trust is irrevocable as to the property contributed by the deceased settlor."

Of interest, Mr. Reggiardo volunteers that *Powell* is not good law. Mr. Schenone disagrees with Mr. Reggiardo, but says *Powell* is an aberration. Ms. Potts moves to oppose the resolution, and Ms. Lodise seconds the motion. Ms. Lee says *Powell* was based upon the language of the trust, but a whole list of cases followed *Powell*. Should we have statutory authority on this issue? TEXCOM votes on Ms. Potts motion to oppose Resolution 12-09-2009.

TEXCOM action: Aye – 14; Nay 6; Abstain – 7.

The motion passes and Ms. Potts is to draw up the counter argument.

Resolution 12-10-2009. Probate: Notice of Trust Revocation to Other Settlor(s) – See discussion after Resolution 12-01-2009, supra, p.6.

Resolution 12-11-2009. Probate: Notice to Heirs of Deceased Settlor of Trust Gift.

This is another proposal by former Chair Valerie Merritt. The proposal involves joint trusts that expressly continue to be revocable by the surviving settlor at the death of the deceased settlor, and requires the trustee to give notice to the heirs of the deceased settlor of the continued revocability of the trusts. Ms. Potts promptly moves to oppose Resolution 12-11-2009.

TEXCOM action: Aye – 22; Nay – 0; Abstain – 4.

Resolution 12-12-2009. Taxation: Amendment of Taxation of Estates and Trusts.

Another proposal by former Chair Merritt, she states existing law as follows: "Unlike most states in the United States, California taxes the income of estates and trusts when there is no fiduciary in the state but there is a beneficiary in the state." Of course, Mr. Hayes is on top of these matters. He says that California is one of three states in the United States that base income tax on the residence of non-contingent beneficiaries. This proposal rightfully gets rid of the beneficiary prong. But it would be more useful to define "fiduciary." Currently, the Franchise Tax Board ("FTB") is working to resolve these problems. Mr. Hayes moves to oppose Resolution 12-12-2009.

TEXCOM action: Aye – 22; Nay – 2; Abstain -3.

Mr. Hayes will write the counter argument.

III. TECHNOLOGY – Chair DAVID GAW

A. E-NEWS GAW

Mr. Gaw says that the e-news will be out next week.

B. Workroom issues HENDEN

A five-page handout is Outline of Proposed TEXCOM Workroom Reorganization, broken down into four major categories: overall organization, files, archiving cycle, and calendaring. Ms. Henden says the workroom now has a different look. She spoke to Chairs in gathering a consensus of what the workroom should contain. Admittedly, the workroom is a work in progress.

In the Overall Organization, material is in two preliminary folders:

A. Folders, which includes Projects (two folders only): TEXCOM Full Committee Meetings and TEXCOM Sub-Committee Projects and Meetings.

Data Rooms (4 folders) including:

State Bar Section – Wide tutorials on workroom functions.
State Bar Section – Wide Resource Room.
TEXCOM rosters, forms, and publications.
TEXCOM archives: Monthly meeting materials, and Standing Sub-Committee Materials, both By Committee and By project.

The archives will become crucial over time as information is stored there.

B. SubFolders (under each Standing Sub-Committee)

II. Files. Including Naming/Numbering Conventions, page 2 of the handout names the conventions, provides Examples, and Tips for uploading.

III. Archiving Cycle. Ms. Henden says the archiving cycle could be on an annual basis, except for legislation, which may be a two-year project. For legislation, one question is whether to move the files when a concept becomes legislation, or whether to leave it in Committee project files. Ms. Potts suggests leaving it in project files until the proposal becomes a bill. Mr. Stern agrees, saying the legislative files should have only the proposal. Mr. Corey wonders if we might create sub-folders for background information. Ms. Hand notes that, quite easily, background material becomes voluminous. Ms. Lodise agrees with Ms. Potts and Mr. Stern-i.e., keep the legislative file relatively clean. Mr. Matulich asks if we can have a link from legislation to the files. Ms. Henden says "Yes, we could create an audit trail." That is, leave background material in the workroom while the bill is active, and cross reference it.

Ms. Henden asks if we should have two folders or have one sub-folder and move it. She calls for a vote. Have two folders with a button to cross reference?

TEXCOM action: 15 prefer.

Have one folder and move it?

TEXCOM action: 2 prefer this approach.

Referring to the Archiving Cycle, Ms. Potts says the TEXCOM year begins with the November meeting and ends with the annual meeting the next calendar year.

C. Members webpage content review – N.R. HENDEN/REGGIARDO

IV. NCCUSL – Chair NANCY HOWARD – N.R.

V. QUARTERLY – Executive Director: PHIL HAYES; Editor: ANDY ZABRONSKY

A. Winter issue

Mr. Hayes says the Winter issue is at the printer's offices, which will be followed quickly by a Spring Issue, and then a Summer Issue.

B. Spring issue deadlines
   1. Manuscripts – February 1, 2009
   2. Alerts – March 1, 2009

C. Summer issue deadlines
1. Manuscripts – May 1, 2009
2. Alerts – June 1, 2009

VI. ETHICS – Chair MEG LODISE

A. ABA 1.14 & RULES Revision Commission LODISE/STERN

Mr. Stern gives background. In 2004, we recommended that the Rules Revision Commission ("RRC") adopt ABA model rule 1.14 and adopt a new Business Professions Code section 6068.5. The RRC took the substance of our proposal and fashioned it into a Rule of Professional Conduct which is being distributed for comment. This proposal does not apply to attorneys for conservatees or juveniles. Ms. Lodise says the Probate Code is not clear regarding whether an attorney must represent the best interests of a conservatee or be a mad-dog advocate.

Ms. Lodise notes that at the Ojai Retreat in 2005, we learned the history of the attorney's duty of loyalty and confidentiality, beginning with the Field Code. We learned that we need both a legislative change and a rule change to implement this concept. As noted, the RRC is sending the proposal out for public comment. Now we need a legislative proposal.

VII. INCAPACITY – Chair MEG LODISE

A. Professional Fiduciaries Bureau – developments MATULICH

Ms. Lodise says that a new Professional Fiduciaries Bureau project may include limited conservatorship and related powers. Other jurisdictions tend to allow powers as needed, without giving a grant of overall powers. This is a preview of things to come.

VIII. EADE – Co-chairs JOHN HARTOG and NEIL HORTON

A ten-page handout is entitled "Article 10 Elective Administration of Decedents Estates." Additionally, a three-page handout is a "Summary of Proposed EADE Draft 4/25/09." Mr. Hartog announces that this handout represents the latest iteration of the task force's work, and he thanks particularly Ms. Schroff, Ms. Lee, and Mr. Horton. Mr. Hartog says TEXCOM approved EADE, at the 2008 Retreat at Tenaya Lodge, to apply in five situations; and TEXCOM did not appear to object to applying EADE in a sixth situation where all heirs involved consented. However, this situation is again presented because the entryway into EADE has been modified slightly. The sixth situation is listed in the handout at section 8605. Qualifying Estates, item (f):

> (f) All heirs of the decedent entitled to distribution are adults and have consented in writing to the Petitioner administering the decedent's estate without bond and without court supervision under this article.

Mr. Hartog gives a brief overview of the proposal. The Petitioner files a petition for "Elective Administration" to be heard at a noticed hearing. No publication is required, and the procedure otherwise tracks the current petition for probate. There is no cut-off for creditor's claims, except CCP section 366.2, resulting in distributee liability.

The term "Qualifying Estate" is defined, including an intestate estate. The order authorizing Elective Administration essentially grants expanded authority under the Independent Administration of Estates ("IAEA"). The Notice of Petition for Elective Administration references the requirements for Elective Administration so the recipient would be aware of its requirements. The personal representative would manage the estate without an inventory and distribute without a petition for distribution.

Creditors could make a Request for Special Notice to learn when distribution is made, and to whom. Beneficiaries have a right to request a section 15061 report, as with a trustee. And the beneficiary could file a petition to address any act or omission of the personal representative. The procedure is similar to that of trust administration, so the personal representative could be brought to court. Ms. Carmen Alberio's "image" of this procedure is that all petitioners to administer estates walk into court through the same door, and walk out of court through different doors – i.e., Division 7 or elective administration.

Under the current proposal [and contrary to a prior proposal] if wrong doing occurs during Elective Administration, then the challenge would be brought directly to court, rather then converting the proceeding to Division 7. The reason for this change was because, if the estate were in the middle of an Elective Administration, and the matter were brought back to court to proceed under Division 7, where would the proceeding start?

Mr. Hartog again references the 10-page handout of statutory language and invites TEXCOM's comments and support for this approach. A technician, Ms. Schroff notes that this new "Article 10." would actually be a part of Division 7. Ms. Lee takes the floor to give TEXCOM sound bites that mark Elective Administration:

- Noticed petition with a hearing,
- The interested parties could object,
- No bond and no final accounting,
- After the initial order, court involvement ends; beneficiaries can petition the court during administration,
- No inventory and appraisement is prepared,
- No publication for creditors claims is provided,
- Distributee liability exists, and
- No final report or accounting.

The personal representative essentially has all the powers under IAEA and trust law, and exercises those powers without a notice of proposed action. Nevertheless, a beneficiary can petition the court for redress. The beneficiary would have a right of action against the personal representative, with a four year statute of limitations, commencing with the initial order granting authority to administer the estate under Article 10. However, the personal representative could use the notice of proposed action procedure, and the four year statute of limitations provides the same finality as a petition for distribution.

With this detailed background, Mr. Hartog asks TEXCOM to consider authorizing Elective Administration in the above quoted situation where all heirs of the decedent consent in writing to elective administration.

Ms. Potts coyly asks how we determine that we have "all" the heirs. Mr. Hartog responds that, like current proceedings, if a person is inclined to commit a fraud on the court, it is difficult to detect. Mr. Horton quickly references the Notice of Hearing, which lists the circumstances for initiating Elective Administration. And Ms. Lee confirms that the Notice of Hearing is essentially the same as is currently used in probate.

Ms. Lodise asks if we previously voted on the beneficiary having the ability to go to court, rather than reverting to Division 7. Mr. Hartog responds that the remedy now is essentially the same as the petition to remove or to compel an accounting; it is like a section 17200 proceeding. Nevertheless, Ms. Lodise has concerns because it costs money to file petitions. Ms. Lee responds that the distinction is to give beneficiaries a right of action. If, instead, the estate were to revert to Division 7, where would you start? As Tolstoy advises, all unhappy families are different; and all unhappy probates are different. That is the reason the task force thought to give the beneficiary a right of action.

Ms. Alberio's concern is that this procedure shifts the burden to the beneficiary to bring matters to court. Otherwise, the personal representative is appointed and at the end says "I'm done." That is, after the initial appointment, the personal representative has no further dealings with the court.

Stating the obvious, Mr. Schenone insightfully suggests that if we are going to buy into unsupervised probate, then at some point it has to be unsupervised. Ms. Potts says the problems arise with the rogue personal representative. How would you bring this Elective Administration estate back into Division 7? The estate comes in the door as a probate and goes out the door as a trust. And similar to a trust, the beneficiary must petition to bring the trustee to court. In a lighter moment, Mr. Schenone contrasts trust beneficiaries and Article 10 heirs; both are equally ignorant.

Mr. Ehrman agrees with Mr. Schenone, but he appreciates Ms. Potts' caution that if a rouge "bad" representative is involved, there is no notice to anyone. Pointedly, Ms. Potts says she has seventy cases a year where intestate heirs do not receive proper notice. Having a will presents a different situation. Attorneys do not understand intestacy and do not give proper notice. In everyday life, people say that a person is not an heir because the person had no personal relationship with the decedent. But Mr. Hartog questions this reasoning. He says trusts have the same problem. Section 16061.7 provides if you do not receive notice when required, then the order is not binding.

Continuing, Mr. Hartog says we are lawyers and we focus on problems. Most families do not end up in litigation. The purpose is to make probate more accessible for "most families." However, Ms. Lee does acknowledge that intestate and testate estates are different because a will provides guidance. In the intestate situation, if there are three children and one post-deceased child, leaving grandchildren, most think the grandchildren do not receive anything. Chair Tong wonders what happened to the "toe in the water" approach. Quickly, Mr. Hartog responds that

we are now providing notice, and providing a different situation. Additionally, this Elective Administration would require consent by all intestate heirs.

Mr. Sallus wonders if the only pending question is whether we are going to expand the 2008 Retreat proposal to include the situation where all the heirs agree in writing to Elective Administration. Mr. Horton says the other two requirements are the heirs are adults and waive bond. However, Mr. Matulich says he needs to be reoriented. At the 2008 Retreat we just took straw votes. "Yes," responds Mr. Hartog, but in Monterey we took a formal vote and approved it. Nevertheless, Mr. Green observes that the current proposal has undergone significant change, and so we always may reconsider the proposal. Mr. Stern wonders if we might suspend this discussion until Sunday, to allow people more time to study the hard copy.

Ms. Potts observes that we are not bound by straw polls of the past. Additionally, we can change our mind at any time. Here we are giving direction to the EADE Task Force.

Mr. Hartog seeks to refocus TEXCOM, saying he was only asking for a vote on the above quoted situation where all heirs agreed to Elective Administration, which was item number 6 at the 2008 Retreat. But Mr. Gaw thinks this item presents a different situation. If the drafter of a will or a trust desires, he can require an accounting. If a person dies intestate, there is no similar opportunity. So Mr. Gaw sees this "item 6"situation as different than a situation where all the devisees of a decedent's will consent to Elective Administration. Congenially, Mr. Hartog agrees, but counters that an heir in Elective Administration can request a report from the personal representative. Ms. Alberio seizes the moment to recall Ms. Potts' warning that some attorneys do not understand intestacy. This week she spoke to five attorneys regarding intestate situations, and only one got it right.

Mr. Ehrman says he likes this proposal, and he would like to see this proposal in place, but listening to the discussion, he would also like to see the proposal develop in small steps.

Chair Tong calls for a vote of all those in favor of adding 2008 Retreat item 6 to the EADE proposal, i.e., "All heirs of the decedent entitled to distribution are adults and have consented in writing to the Petitioner administering the decedent's estate without bond and without court supervision under this article."

TEXCOM action: Aye – 12; no – 17; abstain – 0.

Mr. Schenone observes that Mr. Hartog received a greater margin on this item at the 2008 Retreat while he was vacationing in France. But always an optimist, Mr. Hartog says he will work with the situation. Chair Tong asks whether we wish to keep EADE as an open discussion item. Mr. Schenone says "Yes," in June.

Session II
Saturday, April 25

IX. PHIL HAYES ON DIRECTED TRUSTS AND REPEAL OF RULE OF PERPETUITIES

Mr. Hayes provides quite voluminous materials for his hour discussion, including: (i) Memorandum to TEXCOM from Mr. Hayes dated April 23, 2009, "Need For California Directed Trust Statute," (ii) Memorandum to TEXCOM from Mr. Hayes dated April 20, 2009 re "Directed Trusts: Statutory Approaches to Authority and Liability," (iii) Memorandum to Executive Committee from Directed Trusteeship Subcommittee dated January 9, 2007 re "Proposal to Enact a New York Directed Trusteeship Statute," (iv) Memorandum to TEXCOM from Mr. Hayes dated April 20, 2009 re "Repealing or Revising the Rule Against Perpetuities," and (v) article by attorney Christopher S. Armstrong entitled "Dynasty Trusts...a Legitimate and Powerful Estate Planning Tool or An Economic Threat to the Realm... and to the State of California," dated September 8, 2008. Jumping forward to the conclusion of this item, at the end of Mr. Hayes' presentation and after TEXCOM's full debate, (i) Chair Tong directs the creation of an ad hoc committee to develop a directed trust legislative proposal, and (ii) TEXCOM votes 23 to 4, with 3 abstentions, to repeal the Rule Against Perpetuities in California.

Directed Trusts. Mr. Hayes gives some background regarding directed trusts. His handout describes it as follows: "A directed trust statue authorizes a trustor to appoint a third party advisor or director to direct the trustee in carrying out certain duties of trusteeship, and to exonerate the trustee from liability for following the directions of the advisor." The extent of exoneration varies between states. A directed trust arrangement is distinguished from a veto power and a delegation power, where the trustee, usually is only responsible to competently carry out the direction when made. A "trust protector" is subsumed within the trust advisor or trust director concept, usually having a discreet mandate: "to remove and replace the trustee, to amend the trust, to comply with changes in the law, to move situs, etc. Any statue authorizing directed trusts should clearly indicate that it covers the trust protector situation also."

In practical application, Mr. Hayes says directed trusts are useful: (i) when the client does not want to use a corporate trustee to invest, but wants its administrative capability; (ii) the corporate trustee balks at running a family business, hedge fund or LLC, or maintaining a concentrated position; and (iii) the client wishes to separate management and the investment functions on one hand, from discretionary distributions on the other.

Mr. Hayes continues. Twenty nine states have enacted directed trustee enabling legislation using, roughly, one of three approaches: The Restatement Approach, the Uniform Trust Code ("UTC") approach, and the "more protective" approach, which reflects the modern trend. And Mr. Hayes' initial memorandum discusses those three approaches.

Mr. Hayes continues further. California statues do not explicitly authorize a settlor to assign discreet duties to third parties and to absolve the directed trustees. One might *infer* such authority from the statutes, and some practitioners do draft trusts whereby a trust advisor or trust protector

directs the trustee, but such practitioners tempt fate. Probate Code section 16040 describes the trustee's basic standard of care. Sections 16040 and 16046 [Uniform Prudent Investor Act] both contain a subsection (b) providing "The settlor may expand or restrict the standard provided in [this section] by express provisions in the trust instrument. A trustee is not liable to a beneficiary for the trustee's good faith reliance on these express provisions." Thus, a settlor in California may relieve the trustee of the duty to diversify but, in practice, corporate fiduciaries refuse to accept the risks of holding a concentrated position. And, of course, in California, the settlor cannot exculpate a trustee from liability for breach of trust committed *with gross negligence*, which is a broad concept. Accordingly, the exculpation clause in California, even when coupled with a waiver of the duty to diversify, provides fig leaf protection for trustees. Additionally, section 16042 broadly holds a cotrustee (analogous to a directed trustee) liable for a cotrustee's (direction advisor) breach of trust where the trustee knows or *reasonably should have known* of the breach.

Trust Situs. Mr. Hayes confesses that, as a practicing lawyer, he was seldom concerned with trust situs. But at Bessemer he looks with a jaundiced eye regarding situs. Alaska and other states have sold their souls for money to be a trust situs. But California is the seventh largest economy, so why should we worry? Still, California banks are opening in Nevada because Nevada has jumped into the trust situs marketplace. Mr. Hayes' job at Bessemer involves part of the new trend in pointing clients to states which warm to their business interests. Washington has no income tax.

California has a fiduciary/residence based tax. Bessemer requires a 10 million dollar fund before Mr. Hayes becomes involved. People with family businesses and similar concentrated positions want a directed trust. To lower Bessemer's risk, Mr. Hayes may need to refer California attorneys to Delaware attorneys. There, about 17 attorneys sit around with the Chancellor and decide cases.

Accordingly, Mr. Hayes has cherry picked areas that California could change, such as the fiduciary income tax. A California fiduciary who has capital gains exposes itself to fiduciary income tax. This area is fraught with danger because, for example, a fiduciary was recently sued for using its New York office for business instead of its Delaware office. In California, fiduciary income tax involves two prongs: (i) the residence of non-contingent beneficiary's, and (ii) the residence of the fiduciary. Currently, having a California trust protector raises California tax issues. Perhaps 20 people in California know how to get around California tax issues.

The Rule Against Perpetuities. Going hand in hand with state income tax is the Rule Against Perpetuities. Smiling, Mr. Hayes calls for a showing of hands of those who would repeal the Rule Against Perpetuities in California. Receiving sparse response, he asks how many do not care? And, again, he receives few responses. Seeking to spark greater interest, Mr. Hayes says California should be a Pacific Rim financial center, but business is going to other states instead. He is even more concerned today than when he wrote an article for our Quarterly for Summer 2008, entitled "R.I.P. For RAP – California's Turn to Reform the Rule?" Mr. Hayes' April 20, 2009 memo to TEXCOM regarding the Rule Against Perpetuities references two attached articles.

The Rule Against Perpetuities ("Rule") was originally enacted to prohibit perpetual estates in land in 17th century England, but it has outlived its usefulness, except as a method of torturing law students. As discussed in his *Quarterly* article, dynasty trusts can be created outside of California. Whatever protections the Rule provides in breaking up concentrations of wealth has waned, given the advent of national trust companies and the revolutionary change to a national trust situs system. In any event, as the Quarterly article states, the generation-skipping transfer ("GST") tax has killed the Rule. As Mr. Hayes surmises, the debate is not really about whether the Rule is a good thing – its virtues are irrelevant so long as the generation-skipping transfer tax exists.

Classically, as stated by Professor John Chipman Gray, the Rule provides that "no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." The common law rule sought to prohibit the remote vesting of future interests. The Rule sought to curb dead hand control and maintain alienability of property. Mr. Hayes hints that the Rule should be eliminated because it causes trusts to end prematurely; and trusts should be available for those who want a perpetual trust for family business, to avoid GST, etc.

Of incidental interest, Mr. Hayes references the race between Bessemer and US Trust. Bessemer is owned by five trusts set up in June 1932 when the gift tax was enacted (6-4-32). US Trust was set up in the 1950's and was swallowed first by Schwab, and then by Bank of America.

Returning to the Rule, Mr. Hayes notes that the unborn widow and the fertile octogenarian are interesting concepts. The Uniform Statutory Rule Against Perpetuities ("USRAT") was developed by NCCUSL in 1986. It sets forth a wait-and-see period of 90 years, and also allows reformation of instruments that would otherwise be void under the common law rule. Mr. Hayes invites comments. Mr. Sallus observes that examples exist of great concentrated wealth, including Ford, Rockefeller, Getty, Mellon, etc, during the past 100 years. The Rule Against Perpetuities is simply a concept in how history works. That is, the workers want a voice in government and seek to insure that a few families do not control the entire country. Of course, the old adage is that the first generation gathers the wealth, the second generation uses and spends that accumulated wealth, and by the third generation, the wealth is gone.

Mr. Hayes' concern is the loss of business in California; but, he muses, on the other hand, businesses operating in California must be taxed. Mr. Hayes notes that people become wealthy because of business decisions, not business structure.

TEXCOM Discussion. Mr. Hartog notes that professors at both Bolt and Harvard have done a study on the Rule Against Perpetuities and concluded that, by the third or fourth generation, holdings are more like a mutual fund. That is, the Rule's concept no longer applies because the accumulation of land is no longer of concern. The way to address great wealth is with taxation. Accordingly, the 17th century model is not applicable in this market economy. From 1995-2003, trust funds under management increased by fourteen billion dollars.

Mr. Hartog suggests the directed trust is not unknown in California law. We are dealing with an evolution, not a revolution. He thinks California should adopt a clearly enabling statute.

Mr. Stern agrees that the Rule may be eliminated. He harkens back to the mansions of the baronial families in Bar Harbor, Maine. They are gone; Martha Stewart owns the Ford estate. Mr. Schenone humbly acknowledges that he is only an attorney from Hayward, California. But in providing estate planning involving children and grandchildren, he runs up against that Rule. Mr. Gaw joins in Mr. Hartog's reasoning. From Napa, he goes out of state to set up a trust only a few times a year. But when people with a family business come to him to perpetuate ownership, he goes out of state to allow a company to be held in the family. In such situation, the clients' love the directed trustee; but the average person does not wish to pay a South Dakota trustee.

Ms. Potts comments on both the directed trustee and the Rule Against Perpetuities law. She believes in having the Directed Trustee and agrees that it should be clearly embraced by Californians. As to the Rule, she was formerly an advocate, but now supports its repeal. She tells a war story regarding her handling of three trusts, with initially 50 beneficiaries in each trust. By the point of termination, the trusts had 500 beneficiaries. Unfortunately, those beneficiaries broke into ideological factions regarding the handling of the trusts. No oil and gas company would sign an agreement with that many signators. She resolved the situation by having each faction nominate a representative. And then the representatives employed mandatory arbitration to deal with the mass holdings. Beneficiaries finally received a lump sum payment, but the payment was not as much as they could have received had the entity survived. By the fifth generation, people did not understand where the wealth came from; instead, they just spent it.

Regarding the directed trustee, Ms. Hand says the California Bankers Association ("CBA") is pushing for a variation of the directed trustee statue. CBA would like to have a settlor and then agreements among co-trustees. Ms. Hand prefers a statute allowing a directed trustee to perform various functions. We should spend the rest of our time preparing a directed trustee statute. And Mr. Hayes says he could submit a proposal for the directed trust. Mr. Horton says TEXCOM seems to agree on adopting a directed trust statute and that project could be assigned to committee. Someone notes that Scotland has no Rule, while England and Wales do; but no horror stories exist. As to the Rule, Mr. Horton agrees with Ms. Potts that we must consider unexpected consequences. If we do away with the Rule, then power could vest in a perpetual trustee, such as the Hearst Corporation.

Focusing on the directed trust, Ms. Lee observes that multiple versions exist. Some directed trustee statutes undermine the UPIA. Ms. Hand notes the directed trustee statute might allow the settlor to decide who does what. Chair Tong directs the creations of an ad hoc committee to develop a directed trust statute, with Mr. Hayes to lead that committee. Ms. Potts suggests that we not invite CBA into the group. We should tell CBA that we are working on a directed trust statue and will run it by them before we introduce it into legislation. She recognizes that this approach would require some negotiation with CBA at the end of the project. Insightfully, Mr. Zabronsky notes that in a directed trust you are taking someone off the hook and putting someone else back on the hook; someone needs to be ultimately responsible. Mr. Hayes agrees, saying he is critical of the Delaware statue which leaves things hanging.

Mr. Hartog moves that the Estate Planning Committee develop a proposal to repeal the Rule Against Perpetuities in California. Mr. Sallus cautions that we should also see if any other federal tax provisions are applicable. TEXCOM votes on Mr. Hartog's motion that the Estate Planning Committee develop a proposal to repeal the Rule Against Perpetuities in California.

TEXOM action: Aye – 23; no – 4; abstain – 3.

X. NEIL HORTON, SIL REGGIARDO, AND JOHN HARTOG ON TRUST AND WILL FORMALITIES

Handouts for the discussion in comparing trust and will execution formalities include: (i) a seven page document by Mr. Hartog entitled "Is There a Need to Require Formalities When Executing Will Substitute Revocable Trust?," (ii) a five-page article from 34 ACTEC Journal (2008) entitled "The UPC Authorizes Notarized Wills," and (iii) a six-page document in legislative proposal format for discussion purposes to follow a recent Uniform Probate Code ("UPC") amendment allowing a notary to witness a will. Mr. Reggiardo says TEXCOM earlier discussed having a notary serve the witnessing function for a will, and it fell flat. But Mr. Horton wants to explore the concept further. Is one notary as good as two witnesses? He suggests that the purpose of witnessing is to identify the person signing the document, who wants the document to be his/her will. The witness does not test for capacity and does not provide a protective function. Mr. Reggiardo turns to Mr. Hartog's memorandum discussing the formalities of will execution. Execution of wills has historically required an adherence to four formalities:

- The *ritual* element – a notary provides ritual,
- The *evidentiary* element – the issue is who signed the document,
- The *protective* element – witnessing does not protect against undue influence,
- The *channeling* element – the objective is to have a uniform approach.

As background, three basic requirements exist for an attested will: (1) a writing; (2) signature by the testator; and (3) attestation by witnesses. Of these basic will execution requirements, revocable trusts differ only in the third requirement. And in a very entertaining fashion, Mr. Hartog's memorandum discusses the Statute of Frauds (1677) and the Wills Act (1837). Compliance with will execution formalities creates uniformity in organization, language, and content for most wills. Courts readily recognize whether a document is a will. This *channeling function* creates a safe harbor and provides assurance to the trustor that testamentary bequests will be carried out. Today, transferors execute instruments later in life, when their vulnerability to malevolence and greed has increased. This risk encourages continued reliance on the traditional formalities. Mr. Hartog suggests that the execution requirements for wills and for revocable trusts be the same.

Mr. Reggiardo continues. These days, estate planning documents are routinely done before notaries. The UPC was amended in 2008 to allow the notarized will as an optional method of execution. Ms. Howard agrees with Mr. Reggiardo. She adds that the statutory power of attorney form must be notarized. And Mr. Matulich agrees there should be uniformity in testamentary document execution, one way or another.

Again, Mr. Hartog makes clear his belief that a revocable trust should be signed the same way as a will because it is a will substitute. But Mr. Reggiardo tries to play a trump card, saying he does not think the Legislature would approve anything that makes "signing" more difficult. If you seek uniformity, he argues, allow wills to be notarized.

Mr. Horton makes three quick points: (i) he concludes that having two witnesses for a revocable trust will not work; (ii) he asks why we would require two witnesses when the objective is to carry out the settlor's intent at death; and (iii) in holographic writing, it frequently is not clear if a document is a will or an intent to make a will. He tells a short war story. Recently an intelligent client was dealing with the fourth or fifth generation of the estate plan. The client wanted documents emailed to him, and the will came back notarized. Previously, 30-40 years ago, people came in to sign wills. Today, people sign wills, trusts, powers of attorneys, and other testamentary documents. Using a notary would make life easier.

Mr. Stern observes that having uniformity of trust and will execution is very appealing. He ventures that Mr. Reggiardo and Mr. Horton make interesting points regarding the merits of notarization, but most importunately, we need uniformity.

Referencing practical experience, Mr. Sallus says there is a significant difference between a will and a trust. A trust may never be funded, whereas with a will, all the person need to do is die to have it become effective. Mr. Crickard observes that, implicit in Mr. Hartog's proposal, is the argument that two witnesses are better evidence than one notary. Ms. Hand suggests that we not lose sight of the difference between a will and a trust; a trust is a relationship that may even be created orally. Ms. Schroff says she would not like to see the notary be required. Elders have friends who can sign as witnesses, and notaries are more difficult to find. Mr. Green suggests that, personally, he would require the trust and the will to be notarized.

Insightfully, Ms. Lee says allowing a notarized will is really a back door approach to having only one witness. She had three recent cases involving notarized documents that were forged. In a will contest, if you find the witness, the case resolves faster because the witness will remember the events surrounding the signing. Florida has an elder population and accompanying issues regarding undue influence and lack of capacity. Florida just adopted a two witness requirement for trusts. Sensing support, Mr. Hartog says the notary only looks at the identity of a person, not a person's capacity. Witnesses may know the person.

Mr. Reggiardo injects that we may have some bootstrapping in will validation through the newly enacted harmless error rule. Ms. Lee states that, under current law a notary can sign, and then you need one more witness. If you reduce the witnessing requirement to be a notary only, it is less protective. Mr. Ehrman says he finds this discussion interesting, but it does not really relate to his clients. If he sends estate planning documents out and they come back improperly signed, he does it again. Mr. Horton compliments Mr. Ehrman on his good practices, but suggests that other people practice law differently; and Ms. Lee nods in agreement. With the Probate Court, she sees the result of those who practice law less efficiently than Mr. Ehrman.

Mr. Hartog asks if it would be progress in the law to have uniform rules on signing wills and trusts. Mr. Baer says he is having a hard time sorting this out. Whether having notarization or

two witnesses is preferable is difficult to say. He thinks there should be common ground and that trusts and trust amendments should be notarized. Most litigation involves trust amendments; it would be helpful if those trust amendments were notarized.

Mr. Horton moves that we not require two witnesses to validate a revocable trust.

TEXCOM action: Aye – 27; no – 2; abstain – 2.

Mr. Horton next moves that we approve in principle the validation of a will acknowledged by a notary, in addition to the current method of execution. Ms. Hand asks if the notary must attest to the same thing as a witness – i.e. that the notary knows that it is a will. Mr. Reggiardo again plays the trump card, saying the Legislature would not approve a requirement for notaries to do other than what they currently do. TEXCOM votes on whether to allow a notarized will.

TEXCOM action: Aye – 11; no – 15; abstain – 3.

XI. DAVID BAER AND LITIGATION COMMITTEE ON EVIDENTIARY HEARINGS IN PROBATE MATTERS

Handouts for this topic include: (i) Litigation Subcommittee Proposal to Amend Probate Code Sections 1000 and 1022 to Harmonize Motion Practice in Probate Proceedings and Civil Actions, (ii) a 9-page article by Mr. Zabronsky entitled "A Square Peg in a Round Hole? Civil Law and Motion Pleadings in Probate Proceedings," and (iii) a 2-page message from Mr. Brown to Mr. Baer entitled "Tentative Ruling – Demurrer not authorized in Probate Action."

The Litigation Subcommittee Proposal provides as its "Summary of Proposal:"

"The Litigation Subcommittee proposes amending Probate Code sections 1022 and 1000 to clarify that: (1) The general rules regarding the admissibility of verified papers under the Code of Civil Procedure also apply in probate proceedings; and (2) the motions generally available in civil actions are also available in probate proceedings."

Mr. Baer says the fundamental issue asks when a verified pleading should be admitted. Some California cases decide that the same rules do not apply in probate proceedings and in civil actions. Probate Code section 1022 makes a positive statement that "[a]n affidavit or verified petition shall be received as evidence when offered in an uncontested proceeding under this code." *Estate of Bennett* (2009) 163 Cal. App. 4th 1309 and *Evangelho v. Presoto* (1998) 67 Cal. App. 4th 615, 620, have both construed section 1022 to imply the converse of what it states: -i.e., that affidavits are inadmissible in contested probate proceedings.

The first proposal, after slight tweaking later in the discussion by Mr. Crickard, would amend Probate Code section 1022 to state:

"An affidavit or verified petition shall be received as evidence as provided by section 2009 of the Code of Civil Procedure when offered in an uncontested proceeding under this code."

The Litigation Subcommittee generally likes this proposal. As the Litigation Subcommittee proposal stated at page 5, footnote 5, there is good reason to believe that *Evangelho* and *Bennett* failed to consider the legislative history, which is then recited, including amendments in 1927 and 1943. In all events, the proposed amendment would make clear that affidavits might be admissible in probate proceedings. Mr. Baer comforts TEXCOM in saying that no case needs to be overruled because each questioned holding still applies in its own context.

Next, however, the Litigation Subcommittee is divided on how best to amend section 1000. The paper presents three alternatives, with two variations of the third alternative. The goal is to make the law and motion practice uniform among the probate courts in the various counties.

Mr. Zabronsky says it is not clear that section 1000 needs to be amended. But he agrees that it is written in a funny way, referencing vexious litigants and discovery. TEXCOM briefly discusses section 1000, but then returns to consider amending section 1022, which is more pressing.

Mr. Sallus moves to adopt the proposal to amend section 1022. Mr. Crickard suggests inserting the new language after the word "evidence," and Mr. Sallus accepts the friendly amendment.

TEXCOM action: Aye – 28; Nay – 0; Abstain – 0.

Returning to section 1000, Mr. Lodise likes Alternative No. 2. Brief discussion occurs, but Mr. Baer notes that it is noon. Chair Tong concurs, saying that we can consider it tomorrow, if time permits. [Time did not permit.]

XII. LEGISLATION REPORT AND DISCUSSION – CHAIR COREY/EHRMAN

A. REVIEW OF LEGISLATION

1. 2009 T&E Proposals approved by the BOG [SEE BILLS BELOW]
   a) T&E 2009-08 (Collection of Personal Property in Estate by Sister State Personal Representation without Ancillary Administration
   b) T&E 2009-09 (Trustee's Duty to Inform Beneficiaries: Clarification and Expansion)
   c) T&E 2009-10 (Trustee Notification)
2. Approved Projects
   a) T&E 2010-1 (Probate Code section 1470 – appointment of Counsel)
   b) T&E 2010-2 (Change to Statutory Will form)
   c) T&E 2010-3 (Increases to Summary Proceeding limits)
   d) T&E 2010-4 (Statutory Power of Attorney fix)

B. IMPORTANT GUIDELINES FOR BILL TRACKING

1. Please use approved format for legislative proposals.
2. Please use approved comment form for legislation comments.
3. Always send your comments or position papers to Saul and Jennifer and not directly to a member of the legislative staff or author.
4. Online Bill Tracking legislative information: www.leginfo.ca.gov/ [GO TO THIS SITE FOR TEXTS OF ANY BILLS THAT HAVE NOT BEEN UPLOADED TO THE AGENDA PACKET] and capital tack (See Legislation Committee Workroom Folder & Legislative Matrix)
5. Coordinate contacts with Legislative staff and testimony with the Legislative Chair, Saul and Jennifer.

C. BILLS, BY SUBCOMMITTEE

1. CLRC

a) SB 105 (Harman) – Donative Transfers HORTON

Mr. Horton says SB 105 involves the care custodian – donative transfer situation. The Judicial Council seemed negative, but has not taken a position. The first legislative hearing is on May 5. Mr. Horton posted our letter of support which was sent to Senator Harman's office.

b) AB 1163 (Tran) – Decedent's Estates HORTON

A handout is a two-page Draft legislative position letter to Saul Bercovitch from Mr. Horton in supporting AB 1163. AB 1163 involves the survival of the attorney-client privilege after the client's death. TEXCOM has been interested in this proposal for a number of years. AB 1163 does not comprehensively address that issue with regard to non-probate transfers; but it improves existing law by clarifying that the privilege is held by a personal representative who is appointed for subsequent estate administration (section 12252). And it clarifies that the existing exception to the attorney-client privilege, which applies when all parties claim through the deceased client (Evid. Code section 957), applies when one or more parties claim through a non-probate transfer. Mr. Horton says AB 1163 kicks the can a little further down the road. The CLRC will look at non-probate transfers later. He views this as a modest improvement in the law and moves to support AB 1163.

TEXCOM action: All support.

2. ESTATE PLANNING

a) AB 442 (Arambula) – Notaries SCHENONE

Mr. Schenone says AB 442 is moving towards approval.

b) AB 724 (Devore) – Revocable TOD Deeds ITO

Obviously reflecting prior discussions, Ms. Ito charmingly suggests that Mr. Hartog should become Mary Pat Toups new friend. She notes that AB 724 is identical to last year's AB 250. Mr. Corey went to the Assembly Committee hearing. AB 724 passed the Committee with a 7-0 vote. It will go to the Senate, where it will be killed in the Senate Judiciary Committee. Ms. Ito submitted our same position letter as for AB 250.

c) AB 761 (Calderon) – Mobile Homes

This bill can be taken off our matrix.

d) AB 898 (Lieu) – Notaries SCHENONE

Wittily, Mr. Schenone says AB 898 seems to be marked by a somnolent status; it is not moving.

e) AB 1094 (*Conway*) – *Record retention*

Mr. Reggiardo says AB 1094 is in the Assembly B&P Committee. It modifies the law that businesses are to destroy personal information about business customers when the information will no longer be retained by the business. The criminal penalties were removed. Ms. Wada will follow up to learn if the State Bar should be involved.

f) AB 1132 (Jones) – Organ Donation RICHARDS

AB 1132 involves registration of automobiles and encourages people to make organ donations. An amendment provides links to the DMV website. Ms. Wada says the bill is in the Appropriations Committee because it involves costs. She will follow up on the bill.

g) SB 98 (Calderon) – Viatical Settlements HOWARD

Ms. Howard says SB 98 was originally a spot bill. Now it is rewritten to crack down on life insurance settlements. An industry is springing up in this area; people become insured with the view to selling the insurance to a group later. The industry is active particularly in retirement communities and in high end areas.

SB 98 imposes a licensing requirement and a disclose requirement for persons involved in such "life settlements." The bill references trusts, which are sometimes used in the process. Ms. Howard says we have nothing to add, but SB 98 does impact the sale of life insurance policies. Some segments of the life insurance industry do not like these practices. Looking at the history, Ms. Wada says the proponents are trying to negotiate amendments with the opposition. The bill is in the Appropriations Committee and is a work in progress. Ms. Howard notes that the Governor vetoed a similar bill last year, giving reasons for the veto. Ms. Howard believes we should watch this bill. Mr. Ehrman says the bill seems to redefine insurable interests regarding life insurance trusts. And Ms. Howard notes one question is whether a trust may involve an insurable interest.

h) SB 237 (Calderon) – Real Estate Appraisers RICHARDS

Mr. Richards reports SB 237 would make it unlawful to improperly influence a real estate appraisal. It not only deals with mortgage loans, but also impacts those who retain appraisers. Of course, attorneys retain appraisers all the time. Now an exception is added for attorneys who order an appraisal involving a bona fide client relationship. Ms. Wada says the bill is being revised to include further clarifications.

i) SB 238 (Calderon) – Medical Information HORTON

Mr. Horton says this former spot bill now deals with when pharmacies can reveal information about clients. We can drop this matter.

j) SB 767 (Cedillo) – Notaries SCHENONE

Mr. Schenone says SB 767 now involves revenue and taxation, and no longer involves notaries. We can remove it from our watch list.

3. INCAPACITY

a) AB 82 (Evans) – Dep. Children; psychotropic meds LODISE

Ms. Lodise says AB 82 involves the court making orders regarding children who are wards of the court and psychotropic medications. It is in the Appropriations Committee. She will continue to watch it.

b) AB 215 (Feurer) – Long-term health care facilities BELTRAN

Mr. Beltran says AB 215 involves posting complaints and ratings in the lobby of a long term care facility. He likes AB 215, but would also like to see complaints and ratings posted on the internet. Ms. Wada says we could suggest internet posting to the author. The support group for this bill is big, and they would probably accept the amendment. But the hospital association is against it. Ms. Wada will inquire of the author regarding internet posting, and will be in contact with Mr. Beltran. Ms. Wada adds that no hearing date is yet assigned.

c) AB 276 (Hayashi) – Professional Fiduciaries MATULICH

Mr. Matulich says AB 276 involves enrolled agents, CPA's, and licensing. The bill now exempts both enrolled agents and CPA's. The enrolled agent must pass a three part test and pay a fee, whereas a professional fiduciary must pay a larger annual fee.

Ms. Lodise says the Committee has not discussed the bill. Mr. Matulich says PFAC is opposed, and CJA is not happy about the bill, but will not oppose it. Ms. Wada says the Judicial Council

requested clarification regarding enrolled agents and CPA's involving powers of attorney etc. It would like to know our position.

Ms. Lodise says the Incapacity Committee should have an ad hoc meeting and respond, including possible opposition. Ms. Wada says no hard deadline is imposed because the bill is in the Appropriations Committee – by the end of the week is good. Chair Tong suggests having the Incapacity Committee look at the bill and respond, with TEXCOM delegating their duty to the Committee.

TEXCOM action: All approve.

d) AB 329 (Feurer) – Reverse Mortgages BURNS

Ms. Burns says that AB 329, involving reverse mortgages, has been amended twice at the bankers request as of April 17, 2009. Chair Tong asks if the amendments would impact our prior support. And Ms. Burns says "No."

e) AB 416 (Block) – Developmentally disabled – prevention of abuse LODISE

Ms. Lodise says she is watching this bill.

f) AB 681 (Hernandez) – Confidentiality of psychiatric information LODISE

Ms. Lodise says she is also watching AB 681, which seems to be moving.

g) AB 768 (De La Torre) – Elder Abuse; changes to Penal Code COREY

Mr. Corey says AB 768 [and SB 344] impacts the Penal Code definition of elder abuse. We should watch these bills.

h) AB 989 (Block) – Senior Insurance; actions against insurers

Ms. Lodise reports AB 989 does not seem to be moving, and we are simply watching the bill.

i) SB 308 (Harman) – Professional Fiduciaries MATULICH

Mr. Matulich says SB 308 would revise the definition of "professional fiduciary," which we worked on last year. SB 308 has been amended to reflect updated language. We will continue to watch the bill.

j) SB 543 (Leno) – Minors, consent to mental health treatment

Ms. Lee says this bill would allow minors twelve years of age and older to consent to mental health treatment in specified circumstances. This bill is out of purview and we can drop it.

k) SB 344 (Strickland) – Crimes against elders COREY

See also AB 768, supra. This bill amends the Penal Code definition of elder abuse. We should watch it.

l) SB 660 (Wolk) – Reverse Mortgage BURNS

See also AB 329, supra. Ms. Burns says we did a letter of support for SB 660. Mr. Burns adds that AB 329 and SB 660 had provisions extending the rescission period on reverse mortgages for 30 days. We should check to see if that language was deleted. Mr. Corey says the bankers do not like the bill.

m) SB 661 (Wolk) – Residential care facilities – admissions COREY

Mr. Corey says he is following SB 661.

n) SB 681 (Wolk) – RCFE Admission agreements COREY

Mr. Corey says this is a duplicate item which may be deleted.

o) SB 819 (Comm) – Professional Fiduciaries MATULICH

Mr. Matulich says the statutory language is being clarified to be more in compliance with the applicable regulations. Ms. Lodise suggests that we join in support if the author needs help. Should we get a letter of support in the file? Ms. Wada will review the bill and speak with the author about our sending a letter of support.

4. INCOME AND TRANSER TAXES

a) AB 103 (De Leon) – Property taxation; CIO PHARIES

AB 103 would provide that a transfer in real property from one cotenant to the other that takes effect upon the death of the transferor cotenant, and before January 1, 2020, does not constitute a change of ownership. This bill is similar to SB 153 last year, which the Governor vetoed. Mr. Pharies will watch this bill.

b) AB 129 (Ma) – Confidentiality: taxpayer comm. JAECH

Mr. Jaech says AB 129 would extend an attorney-client type privilege to CPA's and enrolled agents. Mr. Jaech will watch this bill.

c) AB 321 (Niello) – Property tax base year values PHARIES

Mr. Pharies says AB 321 would tweak the provisions allowing a resident owner who is over 55 years of age to transfer the base value to replacement property of equal or lesser value within two years. This bill would provide the spouse of the person claiming property tax relief who is a record owner of the replacement dwelling should not be considered a record owner in any future claim filed by the spouse. That is, AB 321 would impact the marriage penalty so that both spouses could claim. A hearing is set for April 29.

d) AB 697 (Calderon) – Property tax JAECH

Mr. Jaech boldly announces that we can add four bills to the "do not follow list," including this one. AB 697 now involves underpayments of income and corporation taxes.

e) AB 1087 (Ma) – Property tax JAECH

We can delete this bill, which now involves sales and use taxes.

f) AB 1304 (Saldana) – Documentary transfer tax JAECH

We can drop this bill, which now involves tax exemptions for electric vehicles.

g) AB 1545 (Rev & TaxComm) – UPIA CRICKARD

Mr. Crickard says he will continue to watch this bill involving UPJA.

h) SB 274 (Dutton) – Property tax: base year values PHARIES

Mr. Pharies says SB 274 and SCA 11 involve transfers of property by people over 55 and assessed values. These measures would allow transfer of the base value to a residence worth more than the existing residence, and extend the time to do so. Mr. Pharies will continue to watch these measures.

i) SB 328 (Walters) – Property tax JAECH

Mr. Jaech says we can drop SB 328, which now involves adoption of a flat tax in California.

j) SCA 11 (Dutton) – Property taxation: base year value PHARIES

See SB 274, supra.

5. TRUST AND ESTATE ADMINISTRATION

a) AB 355 (Ammiano) – Decedents estates: sister state personal representative (T&E 2009-10) HENDEN

This is our proposal involving the collection of personal property in an estate by a sister state personal representative without ancillary administration. Ms. Henden reports that AB 355 has been in a state of flux all week. The public administrators filed opposition, but we have hopefully resolved their concern. Accordingly, the matter should move forward in due course.

Ms. Wada says the public administrators may have a new concern. In section 12581, involving the affidavit or declaration required, subsection (7), they want to strike reference to amounts over $100,000. Mr. Schenone says the public administrators fear that out of state administrators would come in and sweep up the good assets, leaving an insufficient balance for creditors. He does not think the proposed amendment is that significant. Ms. Henden agrees. Chair Tong asks if any one opposes the public administrators' language. No one does. Accordingly, Chair Tong directs that the amendment be made.

b) SB 40 (Correa) – Personal information: SSNs GERSON

Mr. Gerson notes that SB 40 would allow disclosure of only the last four digits of a social security number on birth and death certificates; it would be applicable after 1-1-2010. And it looks like SB 40 will pass.

c) SB 276 (Harman) – Nonprobate transfer: comm. prop) SCHENONE

Mr. Schenone notes this bill involves Nonprobate transfers, and appears to be going nowhere.

d) SB 367 (Harman) – Duty to report; notice (T&E 2009-8, 9) HAND

SB 367, as amended April 13, 2009, is a handout. First, referring to the bill at page 8, line 31, Mr. Crickard's sharp eyes catch that the number "16051" should be "16061." Next, the bankers ("CBA") want to amend the bill, but their proposals are objectionable. As background, bankers frequently have co-trustees who do not timely respond regarding financial decisions. We should be sympathetic to that plight, but mom and dad did appoint the kids as trustees. As approved yesterday, the Trusts and Estates Committee will draft a statute allowing the directed trustee; but currently, trustees should not delegate among themselves. As discussed in the March 2009 meeting Minutes (page 12), the bankers wish to add language that "A trustee may delegate investment and management functions to a co-trustee as prudent under the circumstances."

Chair Tong says Senator Harman asks if he could include the bankers' suggestion in the bill. Apparently, the answer is "No." Ms. Hand agrees. She does not know how the bankers will respond, but we should not make that amendment. Ms. Wada says we accepted other amendments from the bankers, and she does not think the bankers will oppose the bill. But Ms. Wada would like to communicate to the bankers regarding our proposal for a directed trust statute. Additionally, she says, CJA may have some concerns, and she will speak with them.

Nearing the end of the legislation discussion, Chair Tong asks if any other bills should be addressed. Mr. Beltran references SB 810, which is a rather monstrous bill adding to the Health and Safety Code, Division 114, concerning Single-Payer Care Coverage. The Legislative Counsel's digest begins "Existing law does not provide a system of universal health care coverage for California residents." Chair Tong says that we will not take up SB 810 at this time.

XIII. TRUST AND ESTATE ADMINISTRATION – Chair MARGARET HAND

A. Hasso v. Hasso report SCHENONE

A one-page handout recites TEXCOM's comments at the February 2009 meeting concerning the proposed, revised section 16350. And a five-page handout by the Hasso Subcommittee is entitled "Alternatives to California Probate Code Section 16350."

Mr. Schenone says those TEXCOM comments included that the percentage test was inflexible. And that the percentage test was difficult to define. What does "gross assets" mean? Alternatively, using "net assets" leads to the same definitional problem. The Committee looked at different options and offers three alternatives for discussion concerning revisions.

Option 1 is the same version of section 16350 TEXCOM reviewed at the February meeting without attempt to correct minor errors.

Option 2 is a version without any percentage test. Mr. Schenone refers to the second handout at page 3, subsection (d) (1) and dramatically strikes through language as follows:

> "(d) For purposes of paragraph (3) of subdivision (c):
>
> (1) *Money shall be treated as received in a distribution in partial liquidation if the money is attributable to the proceeds from a sale, directly or indirectly, by the entity of a capital asset, subsidiary, or, business line.* ~~*In considering whether money is received in total or partial liquidation of an entity to the extent that the trustee receives information indicating that it is a distribution or one in a series of related distributions in total or partial liquidation of the entity*~~. ... "

Mr. Schenone, in striking language, says we delete the percentage test and instead, rely upon information received. This approach protects the trustee because if the trustee makes a decision and distributes, that is okay. Also the notice of proposed action is still available – i.e. to avoid the battle.

Option 3 is a version with a new percentage or "bright line" test. Option 3 presents a different definition of the percentage test as a bright line. In other words, you use the percentage test in subsection (d) (1), but focus on value. If the interest or stock is regularly traded, those values would be used. If the interest is not regularly traded, the carry value would be used, or a later appraisal, if available. Option 3 tries to arrive at a better definition of value.

Mr. Horton observes that Option 2 says allocate to principal. Mr. Schenone says, in Option 2, subsection (b) starts with the allocation to income, and then (c) allows a trustee to allocate to principal specified receipts from an entity. Mr. Zabronsky notes that carry value may not be related to actual value; consider UPIA. Mr. Schenone would consider institutional trustees versus family trustees. He agrees it is a definitional issue; you must figure out what "value" is. But Mr. Zabronsky believes that, in most cases, the trustee will have some idea of value. Can we integrate Option 2 and Option 3?

For example, if you have a family business, then the trustee will have an idea of value. But if little information is available regarding value, then you need to be able to fall back on rules of thumb. UPIA has rules where assets are held directly. But if you are holding common stock, a trustee should have rules of thumb.

Mr. Schenone says rules of thumb are the focus in Option 3. And what do you do involving a family limited partnership or an LLC? Mr. Zabronsky says it is difficult to respond directly, but we may look to change the 20%, etc. Mr. Hartog promptly proposes that Mr. Zabronsky be added to the Hasso taskforce; his comments are thoughtful and provoking. Congenially, Mr. Zabronsky and Schenone agree. Mr. Schenone announces that Hasso will return.

Publication. Raising a new matter, Chair Tong says Ms. Alberio is concerned that publication is quite expensive in some counties; and it will only get worse. Ms. Hand says we should identify the stakeholders and explore internet publication. TEXCOM responds with silence. Seeking to spark interest, Chair Tong says she recently paid $800 for publication in Berkley.

Mr. Hartog says we do need to be more forward thinking. The technology of an advancing society is moving to the internet. Ms. Lee says two issues exist: (1) Should publication occur in another media; and (2) small papers are closing, so we need to expand publication venues that exist in current statutes. Chair Tong agrees, but says we need a short term fix. Mr. Baer observes that the print media is suffering and may well oppose a new approach. Mr. Bercovitch offers to explore the matter intra-bar (the various Sections, etc) and we should prepare to deal with the print media. Ms. Hand adds that the stakeholders include creditors. Chair Tong assigns this project to Trust and Estate Administration. At this point, Mr. Bercovitch and Ms. Wada sign off on the conference call.

XIV. EDUCATING SENIORS – Chair MARC SALLUS

A.	Use of AMA Funds +	SALLUS
B.	Speakers Bureau Reorganization & Training	TONG/STERN)

Mr. Sallus reports that the LA Speakers Bureau program, paid for with AMA funds, was sold out a month before the event. One hundred and thirty attendees registered. The program will be in San Diego in October.

In the last 30 days, we have received 14 more presentations at senior centers. We have also been approached by the Sacramento Bar. If we put on the program, they will pay. The Riverside/San

Bernardino Bar is in the offing. Many thanks to Ms. Orloff and her assistants. We may generate a thousand DVD's of Chair Tong and Mr. Stern's San Francisco presentation. And Ms. Lee suggests that we simply upload their presentation on to YouTube.

C. Wills for Heroes – N.R. SALLUS

XV. EDUCATION – Chair BART SCHENONE

A. Programs for San Diego Annual Meeting SCHENONE

Mr. Schenone says we are now granted permission to provide 7 programs at the annual meeting.

B. Stand Alone Programs SCHENONE

1. Sophisticated Estate Planning – April 17, 2009

Mr. Schenone is pleased to say that this program sold out.

2. The Legal Specialization Exam and You – June 26, 2009

Mr. Schenone says this is the Gaw and Quillinan show. It will undoubtedly fill up.

3. Proposed 2010 Program

Mr. Schenone says we are planning for programs in 2010. And if you have plans, let him know. Planning includes a webinar series, perhaps one program per month to be viewed in attorneys' offices. These are popular in other Sections. Mr. Gerson is spearheading this project.

C. Your Legal Rights SCHROFF

1. Upcoming Programs for 2009

Ms. Schroff acknowledges Mr. Schenone, who just spoke on property tax issues, doing an excellent job. In June, she anticipates a program on FDIC rules.

XVI. CONSERVATORSHIP WORKING GROUP – Chair ED COREY – NR

XVII. CLRC – Chair DAVID BAER

A. Disqualified trustees – new CLRC report

Handouts include CLRC Memorandum 2009-22 [April 6, 2009]. Presumptively Disqualified Fiduciary (Introduction of Study) and a First Supplement to Memorandum 2009-22 [April 15, 2009]. Essentially, the CLRC recently completed a study on Probate Code sections 21350-21356, which establish a statutory presumption of menace, duress, fraud, or undue influence involving a donative instrument that makes a gift to (i) the drafter of the instrument, (ii) a fiduciary who transcribed the instrument, (iii) the "care custodian" of a transferor who is a "dependent adult," and (iv) certain specified relations and associates of those persons. Probate Code section 15642 borrows the section 21350 classifications as grounds for removing a trustee,

unless the court finds it is consistent with the settlor's intent that the trustee continue to serve, and this intent was not the product of fraud, menace, duress or undue influence.

The CLRC memo continues. It notes that TEXCOM suggested the policy underlying section 15642 (b) (6) be extended to provide for removal of an executor when the executor would be a presumptively disqualified beneficiary. This memorandum introduces a study that will consider TEXCOM's specific suggestion, and will also examine whether a similar policy should be extended to other types of fiduciary relationships, including a conservator, the agent under a power of attorney, and the holder of a power of appointment. The CLRC's Executive Secretary Brain Hebert, seeks our input. The CLRC's next meeting is June 17, and our next meeting is June 6. Accordingly, at our June 6 meeting, Mr. Baer will prepare a draft letter regarding our position. Of course, he needs input from TEXCOM.

As to policy, Mr. Hebert wants to make sure clear motive is involved. If present safeguards are not adequate, then we need to provide alternatives. Of course, the executor and the conservator present different issues – i.e. removal vs. appointment. For executors, the potential for abuse exists, but court supervision may mitigate that potential. Should executors or personal representatives be subject to presumptive disqualification.

As noted above, the three main types of "disqualified person" are:

(1) A donnee who drafted the donative instrument.
(2) A donnee who is a fiduciary of the transferor and who transcribed the donative instrument (or caused it to be transcribed).
(3) A donee who is the "care custodian" of the transferor (who is a "dependent adult").

These three could be removed unless a certificate of independent review is in place. Mr. Baer says we should cover each fiduciary one by one.

For conservatorship, Mr. Hebert says disqualification may not be an issue because the court will appoint based upon the best interests of the conservatee.

For the power of Attorney, Mr. Hebert believes a basis for disqualification may exist here because abuse does exist. And the issue will not come up until the wrongdoing is discovered, so the existing statute may not be satisfactory. However, the agent can be brought to court to compel an accounting. The courts recognize that the power of attorney is used for specific purposes, and the power conferred does not include the power to benefit the agent.

For the Care Custodian; we need a functional definition of who is a "dependant adult." TEXCOM discussion ensues.

Executor. Ms. Lodise believes adding the disqualified person categorization would be useful. But Mr. Hartog counters that the executor must qualify and the court can demand a bond, unlike a trustee. The purpose of the disqualification statute is not advanced by saying designated executor has a presumption against him/her.

Mr. Baer injects that the petition should disclose the relationship, so the court could consider that as a factor. Mr. Hartog notes that section 8402 provides for the court not selecting such person. The drafter of an instrument who names him/herself as executor and the sole beneficiary would not be appointed if a contest arose.

Mr. Green opines that there should be an out for after-discovered facts. People commonly do not know what is going on in an estate for a time, especially if they live outside the area. Ms. Hand has had a couple of situations where children were upset when the attorney appointed himself as executor, but they did not respond immediately. And Mr. Hartog likes Mr. Green's idea of expanding the opportunities for removal based upon after-discovered facts. Mr. Horton moves that the executor not be disqualified for purposes of appointment, but it could be added as a ground of removal.

Ms. Lee thinks of a third alternative. An appointment should require full disclosure, and we could add that the court acts in its discretion. Mr. Green notes that section 8402 provides that those ineligible for appointment include "(3) There are grounds for removal of the person from office under Section 8502." TEXCOM votes on Mr. Horton's motion.

TEXCOM action: Aye – 24; No – 1; Abstain -1.

Mr. Baer asks what is meant by "grounds for removal." Mr. Horton says, for a disqualified person, a presumption is created. Mr. Baer asks about disclosure. Mr. Horton responds that anyone who receives a gift from a decedent is a disqualified person if he/she has ever provided social services. Mr. Schenone suggests that we have a rule that drafting attorneys cannot serve. And Ms. Epstein asks whether that rule would be under all circumstances or whether a certificate of independent review would resolve the issue. She emphasizes that the presumption is rebuttable if a person is a disqualified person. Mr. Matulich suggests that we are focusing on an attorney, but we should be referring to any drafter?

Conservator. Mr. Hebert's comment regarding the conservator is quite apt. The conservatorship process vetts out the disqualified person via the court investigator, who provides proper investigation. Ms. Hand says the statute gives priority to the conservatee's nominee. Should we cast a shadow on drafting fiduciaries or allow the sun to shine on nominees? Mr. Green observes that the court investigators do a good job, but they do not focus on documents. Therefore, they could easily overlook such things as how a person became the nominee. Ms. Lee agrees with Mr. Green that the court investigators do not look at the context in which a nominee is determined. She likes Ms. Hand's thought. The nominee situation may be more compelling in the conservatorship context.

However, Mr. Baer ventures that a care custodian may be appointed and, within a month, he/she has talked to an attorney and become the beneficiary of the estate, and then files an action for elder abuse against the former designee. The relationship should be explored before a person is appointed. Mr. Baer moves that a subcommittee be authorized to propose a letter that a disqualified person also includes a conservator.

TEXCOM action: Aye – 15; no – 5; abstain – 3.

Power-of-Attorney. Showing his sentiments, Mr. Hartog promptly says "Off with their heads!" Bolstered by that comment, Mr. Baer moves that the attorney-in-fact be subject to removal as a disqualified person, just as is a trustee.

TEXCOM action: Aye – 22; no – 1; abstain – 1.

Power of appointment. Mr. Crickard quickly points out that holding the power of appointment is not an exercise of a fiduciary power, but an exercise of donative power. Mr. Pharies notes that IRS cases present a very different type of situation. And Ms. Epstein agrees, saying"Very different." Ms. Hand views the power of appointment in limited circumstances as a way of threatening bad actors. Feeling fairly solid support, Mr. Crickard moves that the rules regarding a trustee not apply to the holder of a power of appointment. Mr. Richards says he is not concerned with special powers of appointment, but with general powers of appointment. Ms. Hand notes that, for a disqualified person, the scope of the power is not the issue, but the class of the person appointed. Mr. Crickard comments that each class has the same opportunity for abuse. But a person who has the power to appoint to themselves is making a donative transfer. TEXOM votes on Mr. Crickard's motion.

TEXCOM action: Aye – 21: No – 1; Abstain – 1.

Mr. Baer politely asks how to define a donative transfer. He moves that we include a definition of "donative transfer." Mr. Pharies suggests that no property right is included in creating a power to impact property. The motion is not seconded, and Chair Tong notes the time has come to draw the meeting to a close.

XVIII. ESTATE PLANNING – Chair SIL REGGIARDO – NR

XIX. LITIGATION – Chair DAVID BAER – NR

XX. MEMBERSHIP AND MARKETING – Chair BECKY SCHROFF

A. Membership Count SCHROFF

Ms. Schroff says we are down 284 members, just like other Sections during this dues paying time. As of April 20, 2009, membership is 5,977.

B. CLE brochure SCHROFF

Ms. Schroff invites a motion to authorize up to $3,000 to send the CLE brochure to our members. [No vote taken on this motion.]

Mr. Matulich notes that professional fiduciaries are looking for opportunities to obtain education. Attorneys listen to tapes and receive credit. Perhaps we could develop programs for them with similar certificates.

XXI. INCOME AND TRANSFER TAX – Chair JEFF JAECH – NR

XXII. NEW BUSINESS – NR

XXIII. UPCOMING ATTRACTIONS

A. Speaker Bureau Training – Los Angeles – May 8, 2009
B. TEXCOM Meeting – SFO WESTIN – June 6, 2009 [NOTE CHANGE IN LOCATION]
C. THE CERTIFICATION EXAM AND YOU – June 26, 2009 (Sofitel, Redwood City)

_____

Leonard W. Pollard II (Reporter

TRUST AND ESTATES SECTION
Meeting Calendar
2009-2010

DRAFT

September 10-13, 2009, Annual Meeting, San Diego

Saturday, September 12, 2009, New Member Orientation, 1 – 4 pm (Lunch at 1 pm)
Saturday evening, Cocktails (6:30 pm) and Dinner (7:00 pm), Bertrand at Mr. A's
September 13, 2009, TEXCOM Meeting, 9:00 am – 3:00 pm

Saturday, October 10, 2009, 9:30 am – 3:30 pm
TEXCOM Meeting – LAX Marriott Hotel

Saturday, November 14, 2009, 9:30 am – 3:30 pm
TEXCOM Meeting – SFO Westin Hotel
(33nd Annual Fall Program is on November 13; Soffitel Hotel, Redwood Shores)

Saturday, January 16, 2010, 9:30 am – 3:30 pm
TEXCOM Meeting – LAX Marriott Hotel

Saturday, March 6, 2009, 10:00 am - 3:30 pm
TEXCOM Meeting - Sacramento (Law Offices of Downey Brand)
(Nominating Committee Meeting will be held on Friday, March 5 – Location TBD

Friday-Sunday, April 23-25, 2010
TEXCOM Long Range Planning Retreat – Oakland Claremont Resort and Spa

Saturday, June 5, 2009, 9:30 am – 3:30 pm
TEXCOM Meeting – State Bar Offices, San Francisco

Saturday, July 11, 2009 (TEXCOM Meeting on an as-needed basis)

September 23-26, 2010, Annual Meeting, Monterey

Saturday, September 25, 2010, New Member Orientation, 1 – 4 pm (Lunch at 1 pm)
Saturday evening, Cocktails (6:30 pm) and Dinner (7:00 pm), Fresh Cream Restaurant
September 26, 2010, TEXCOM Meeting, 9:00 am – 3:00 pm

TRUSTS AND ESTATES SECTION

Financial Summary for Period Ending April 30, 2009

		2009 As of 4/30	2009 Budget	2008 As of 4/30	2008 As of 12/31
CONSOLIDATED REVENUES					
Membership Revenue		$437,453	$452,500	$406,220	$451,979
Interest Revenue		$2,543	$25,000	$8,442	$25,750
Miscellaneous Revenue		$103,751	$75,000	$67,235	$96,584
Includes Seminar and Grant Revenues					
TOTAL		**$543,747**	**$552,500**	**$481,897**	**$574,313**
CONSOLIDATED EXPENDITURES					
Employee Expenses		$0	$500	$0	$1,152
Travel/Catering Expenses		$40,927	$185,000	$34,986	$183,567
(Includes meeting rooms + catering)					
Supplies/Postage/Telephone*		$10,550	$15,000	$15,366	$12,840
Furniture/Equipment		$1,947	$7,000	$1,452	$6,675
(Includes copier expenses)					
Professional Services		$15,518	$20,000	$5,864	$19,334
Printing/Outside Other Services		$9,271	$75,000	$23,888	$50,752
Internal Allocation	*	$137,640	$250,000	$127,265	$226,195
(Includes Overhead Assessment)					
TOTAL EXPENSES		**$215,853**	**$552,500**	**$208,821**	**$500,515**

BREAKDOWN OF EXPENDITURES

As of Apr-09	Section Admin.	AM, SEI & Online	Executive Committee	Retreat	Cmt Reimb & Sr Project	**Quarterly & Pubs	Programs	TOTAL
Revenues	$440,375	$13,980	$0	$300	$0	$46,525	$42,867	$544,047
Expenses	$131,882	$506	$34,248	$846	$29,249	$0	$19,122	$215,853
Total 2008 Expenses	$235,354	$23,855	$90,296	$35,336	$1,382	$41,263	$73,029	$500,515

Summary of Total Available Assets as of April 30, 2009

Current Remaining Funds	$327,894
Balance of Assessment for 2009	$137,640
Balance	$190,254
2008 Carry Forward	$475,323
Total Funds (Current + Reserves)	$665,577

Includes funds transferred to Education Foundation Account to balance revenues/expenses

Law Office of Peter S. Stern

400 Cambridge Avenue, Suite A
Palo Alto, California 94306

(650) 326-2282
Fax: (650) 326-1312

April 26, 2009

Ms. Pam Wilson
State Bar of California
Via Internet

Re: TEXCOM Del Mar Retreat—Discussion of Find A Lawyer Proposal

Dear Pam:

I posted to the TEXCOM Retreat Workroom the "Find a Lawyer" presentation given at the Council of State Bar Sections April 8, 2009, telecom meeting and the letter, dated 4/17/09, from the Council's officers.

On April 24, I summarized the presentation components and the position of the officers, and we had a brief discussion. One member spoke about the role of LRS groups in the voluntary bars at some length, underscoring the importance of the work of LRSs for voluntary bar revenue. The only substantive discussion of the proposal came from another member, who noted that LRS panels screen their members, to assure a standard of competency, and that the legal aid groups general offer services to clients who pass a means test. This member concluded that the trusts and estates bar was not threatened by a system that would favor the LRS providers and the legal aid providers, and that we should support the version of the "Find a Lawyer" proposal that is favored by the Board of Governors. We did not further discuss the criticisms of the proposal contained in the officers' letter.

There was general assent that the proposal was a positive one but TEXCOM did not take a vote.

[TEXCOM did not discuss whether or not the process by which this project was developed was appropriate; it is likely that TEXCOM's members would favor more participation by the Sections in development

of this kind of proposal, which will have an impact on all members of the Bar.—May 7, 2009]

Respectfully submitted,

Peter S. Stern, for TEXCOM

PSS:sm

SPR09-43

Invitation to Comment

Title	Probate Conservatorships and Guardianships: Value of estate property for purposes of setting the amount of the surety bond for the cost of recovery on the bond (amend rule 7.207 of the California Rules of Court).
Summary	The proposed amendment of rule 7.207 would clarify that the value of estate property for purposes of setting the amount of the bond for the cost of recovery on the bond is the value of the property at the time of appointment of the conservator or guardian, whether or not there is an appraised value of the property when the amount of the recovery bond is set.
Source	Probate and Mental Health Advisory Committee Hon. Marjorie Laird Carter, Chair
Staff	Douglas C. Miller, Senior Attorney 415.865.7535, douglas.miller@jud.ca.gov

Discussion

Legislation in 2006 amended Probate Code section 2320 to require an additional amount of surety bond to secure the cost of recovery on the bond. The new provision included a direction to the Judicial Council to adopt a rule of court to establish the amount of additional bond and implement the new requirement. Section 2320 was amended again in 2007 to clarify the operation of this provision.[1]

In response to the statutory directive, the Judicial Council adopted rule 7.207 of the California Rules of Court, effective January 1, 2008. Rule 7.207(c)(1) (A) and (B) establishes the amount of the additional bond as including a sliding percentage of the "appraised value" of personal property of the estate and, in some circumstances, the net value of real property of the estate—the "appraised value" of this property less encumbrances.

[1] See Stats. 2006, ch. 453 (Assem. Bill. 363, part of the Omnibus Conservatorship and Guardianship Reform Act of 2006), § 19; and Stats. 2007, ch. 553 (Assem. Bill 1727), § 15. The 2006 legislation added paragraph (c)(4) to section 2320. The 2007 legislation amended that paragraph to expressly provide that attorneys' fees and costs incurred in a successful surcharge action against a conservator or guardian are a surcharge against the fiduciary and, if unpaid, are to be recovered against the surety.

The Probate and Mental Health Advisory Committee proposes to amend rule 7.207(c)(1)(A) and (B) by deleting the word "appraised" from each subparagraph, leaving them to refer, respectively, to the value of the personal property, and the value of real property of the estate less encumbrances.

This change is proposed because in a new conservatorship or guardianship the amount of bond is set at the time of the fiduciary's appointment, before the personal or real property has been appraised by the Probate Referee and before the Inventory and Appraisal has been filed.

This change would not affect the relevant valuation date of the estate's personal and real property for purposes of setting the surety bond. That date is the date of the order appointing the conservator or guardian. See Probate Code sections 2610(a) and 2320(a) and (c)(1).

The text of amended rule 7.207 follows this Invitation to Comment.

Rule Proposal

Rule 7.207 of the California Rules of Court would be amended, effective January 1, 2010, to read:

Rule 7.207. Bonds of conservators and guardians

(a) Bond for appointments after December 31, 2007

Except as otherwise provided by statute, every conservator or guardian of the estate appointed after December 31, 2007, must furnish a bond that includes an amount determined under (c) as a reasonable amount for the cost of recovery to collect on the bond under Probate Code section 2320(c)(4).

(b) Additional bond for appointments before January 1, 2008

Except as otherwise provided by statute, every conservator or guardian of the estate appointed before January 1, 2008, and the conservator's or guardian's attorney, must after that date apply to increase the bond in the manner described in rule 7.204 to include an additional amount determined under (c), and must, no later than June 30, 2008, furnish the increased amount of bond ordered by the court.

(c) Amount of bond for the cost of recovery on the bond

The reasonable amount of bond for the cost of recovery to collect on the bond, including attorney's fees and costs, under Probate Code section 2320(c)(4) is:

(1) Ten percent (10%) of the value up to and including $500,000 of the following:

(A) The ~~appraised~~ value of personal property of the estate;

(B) The ~~appraised~~ value, less encumbrances, of real property of the estate that the guardian or conservator has the independent power to sell without approval or confirmation of the court under Probate Code sections 2590 and 2591(d);

(C) The probable annual income from all assets of the estate; and

(D) The probable annual gross payments described in Probate Code section 2320(c)(3); and

(2) Twelve percent (12%) of the value above $500,000 up to and including $1,000,000 of the property, income, and payments described in (1); and

(3) Two percent (2%) of the value above $1,000,000 of the property, income, and payments described in (1).

Item SPR09-43 Response Form

Title: **Probate Conservatorships and Guardianships: Value of estate property for purposes of setting the amount of the surety bond for the cost of recovery on the bond** (amend Cal. Rules of Court, rule 7.207)

☐ **Agree** with proposed changes

☐ **Agree** with proposed changes **if modified**

☐ **Do not agree** with proposed changes

Comments: _____

_____

_____

_____

_____

_____

_____

Name: _____ **Title:** _____

Organization: _____

☐ **Commenting on behalf of an organization**

Address: _____

City, State, Zip: _____

To Submit Comments

Comments may be submitted online, written on this form, or prepared in a letter format. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments. You are welcome to email your comments as an attachment.

Internet: http://www.courtinfo.ca.gov/invitationstocomment/

Email: invitations@jud.ca.gov

Mail: Ms. Camilla Kieliger
Judicial Council, 455 Golden Gate Avenue
San Francisco, CA 94102

Fax: (415) 865-7664, Attn: Camilla Kieliger

DEADLINE FOR COMMENT: 5:00 p.m., Wednesday, June 17, 2009

Circulation for comment does not imply endorsement by the Judicial Council or the Rules and Projects Committee. All comments will become part of the public record of the council's action.

SPR09-44

Invitation to Comment

Title	Guidelines for Probate Examiners and Court Investigators to Assist Them in Reviewing Accountings of Conservators and Guardians and Detecting Fraud (adopt and authorize distribution of guidelines).
Summary	Guidelines for probate examiners and court investigators are proposed to enhance their ability to detect fraud or see other problems in the administration of the estates of conservatees and wards when they review accountings filed by conservators and guardians.
Source	Probate and Mental Health Advisory Committee Hon. Marjorie Laird Carter, Chair
Staff	Douglas C. Miller, Senior Attorney 415.865.7535, douglas.miller@jud.ca.gov

In response to a statutory directive,[1] the Probate and Mental Health Advisory Committee, working with judicial officers, court investigators, and probate staff attorneys and examiners from several courts, has developed and is proposing the adoption of the attached guidelines for probate examiners and court investigators to assist them in reviewing accountings of conservators and guardians and detecting fraud and other problems in the management of the estates of conservatees and wards. The advisory committee recommends that these guidelines be approved for distribution to the probate departments of the superior courts, addition to the curricula for the Administrative Office of the Courts' Education Division/Center for Judicial Education and Research (CJER) and court-sponsored training programs for these court staff positions, and integration into "best practices" information and idea exchange programs between courts.

The proposed guidelines are divided into two parts. The first part is composed of specific recommendations concerning the review of accountings of conservators and guardians by examiners in connection with their settlement, and by investigators as part of their review investigations in conservatorships beginning with the first annual review after appointment of the conservator. The second part is contained in an attachment to the guidelines, beginning on page A-1, immediately

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[1] Probate Code section 2620.1, added by Stats. 2007, ch. 553 (Assem. Bill 1727), § 21.

following page 12. The attachment is a summary of statutory provisions addressing court staff review of accountings in conservatorships and guardianships and court powers affecting these accountings. This framework includes provisions governing the timing and coordination of accounting and review investigations in conservatorships, requirements for supporting documents that must accompany accountings in conservatorships and guardianships, the format of the accountings and the role of Judicial Council forms in their preparation, and powers of the court concerning them.

The guidelines are organized into the following areas of emphasis:

1. Coordination of accountings and review investigations in conservatorships.
2. Accountings of conservators and guardians who are not professionals.
3. Management of conservators and guardians who are having difficulty with their accountings.
4. Recommendations for situations when a conservatorship review accounting is not coordinated with an accounting.
5. What examiners and investigators should look for in an accounting by a conservator or guardian.
6. Coordinating the work of examiners and investigators.
7. Special concerns in reviewing accountings of professional fiduciaries and selecting accountings for audits or other special scrutiny.

Each of the areas contains recommendations for examiners and investigators. The recommendations reflect a fundamental difference between the roles of these two court staff positions in connection with a fiduciary's accounting. The examiner reviews accountings of conservators and guardians primarily in connection with their settlement. The investigator's review of the accountings of conservators has a different function.

The accounting is an important part of the background with which the investigator must be familiar to conduct annual review investigations in these matters, which include personal visits with the conservatee away from the courthouse. The investigator can become, in effect, an auditor of the accounting. The investigator's personal contact with the conservatee

in the conservatee's home or other personal living situation gives the investigator an opportunity to verify or confirm that expenditures for the conservatee's support and maintenance shown in an accounting are in fact being applied for those purposes. The guidelines emphasize this auditor's role. (See, for example the recommendations to investigators at pages 10 and 11.)

The guidelines recommend also that examiners and investigators attempt to identify conservators and guardians, particularly nonprofessionals, who might be expected to have difficulty with accountings as soon as possible after their appointment. (See the guidelines at pages 6–8.) The guidelines include recommendations on helping conservators and guardians avoid late filing and other common problems with accountings, as well as recommendations concerning court sanctions against these fiduciaries for failure to comply with statutory requirements.

The guidelines also include specific recommendations concerning professional fiduciaries. (See pages 11 and 12.) These include implementation of a program of random audits of accountings of professional fiduciaries, and coordinated examinations of accountings of some professional fiduciaries in more than one matter in a court or in matters filed by them in more than one court.

The advisory committee desires comments on these guidelines particularly from examiners and investigators, and their managers, particularly additional recommendations, and also concerning their distribution and use in training and continuing education.

The text of the proposed guidelines follows this Invitation to Comment.

Guidelines for Probate Examiners and Court Investigators in Reviewing the Accountings of Conservators and Guardians

Introduction

Recent legislation has clarified existing law concerning accountings filed with courts by conservators and guardians.[1] This legislation also is intended to assist the courts in meeting their responsibility to see that the accountings and the reports filed with them fully and accurately disclose the personal and financial condition of conservatees and wards.

The recent legislation also gives court investigators greater access to and use of accountings to aid them in their mandatory post-appointment reviews in conservatorships. Court investigators will be able to use their investigative skills and experience to help probate examiners and judicial officers evaluate and settle conservatorship accountings, particularly in the great majority of cases where no one has filed formal objections to the accountings that would require contested litigation. Investigators and examiners will increasingly perform accounting audit functions in such cases by verifying receipts and disbursements shown in the accountings and confirming that expenditures ostensibly made for the benefit of the conservatee are actually applied for that purpose.

Probate Code section 2620.1[2] provides:

> The Judicial Council shall, by January 1, 2009, develop guidelines to assist investigators and examiners in reviewing accountings and detecting fraud.

The Judicial Council's Probate and Mental Health Advisory Committee, working with judicial officers, court investigators, and probate staff attorneys and examiners from several courts, has developed the following guidelines in response to the statutory directive. These guidelines are recommended by the advisory committee for distribution to the probate departments of the superior courts and for inclusion in curricula for education programs for probate court staff sponsored or supported by the Administrative Office of the Courts' Education Division/Center for Judicial Education and Research (CJER). The advisory committee further recommends that the guidelines be used to stimulate exchanges of best practices by probate departments throughout the state.

These guidelines are recommendations. They are made subject to constraints imposed by each court's staffing, caseload, and funding.

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[1] Attachment A following these guidelines contains a summary of current law concerning accountings of conservators and guardians.

[2] Added to the Probate Code in 2007 (Stats. 2007, ch. 553 (Assem. Bill 1727), § 21).

A. *Coordination of accountings and review investigations in conservatorships*

The most important time to coordinate a review investigation with an accounting in a conservatorship is at the end of the first year after commencement of the proceeding, when the first annual review investigation is required and the first accounting is due.[3] Considerations supporting this conclusion include:

1. The court must decide for the first time in the case whether to waive an annual full review investigation and report at the end of the following year.
2. Ideally, this decision should be made only after a full review of the conservator's accounting, except perhaps in the smaller and less complicated estates.
3. If the accounting is late and therefore is not available at the time of the first annual review investigation, the court may justifiably conclude from that fact alone that a full annual review investigation should not be waived, at least until one or more accountings have been filed in time to be considered in a later review investigation.
4. The court has the opportunity for the first time in the case to see if a nonprofessional conservator is reasonably capable of preparing and presenting a complete and timely accounting. A conservator who shows difficulty with the first accounting could be a candidate for more frequent accountings that are coordinated with later reviews.
5. Unless the court orders more frequent accountings or does not waive the annual full review investigation and report, the next possibility for a coordinated accounting and a full review investigation and report would be at the end of the third year of the conservatorship.

B. *Accountings and nonprofessional conservators and guardians*

Early identification of newly-appointed nonprofessional conservators and guardians who might be expected to have difficulty completing and filing timely and complete accountings is encouraged. Some or all of the following techniques may be useful to accomplish this goal.

[3] A review investigation is coordinated with an accounting if the accounting is filed in time to be reviewed and considered by the investigator before he or she visits the conservatee. (See Prob. Code, §§ 1851(a), 1851.2.)

1. Examiners may:

   a. Identify and flag files of conservators and guardians who fail to attend available court-sponsored training on accounting issues, or who demonstrate unusual difficulty understanding the training they do receive.

   b. Identify and flag files of conservators and guardians who show difficulty in preparing a complete inventory of the cash and non-cash assets of the estate, obtaining an appraisal of the non-cash assets from the Probate Referee, or timely filing the completed Inventory and Appraisal in the first year of the case.

   c. Communicate with the investigator who conducted the initial investigation in each new case involving a conservator with a flagged file as soon as possible, well before the first accounting is due in the case and, if possible, before the investigator schedules the first (six month) review investigation.

2. Investigators are encouraged to:

   a. Learn as much as possible about the conservator's education, experience and background when interviewing a nonprofessional proposed conservator at the time of the initial investigation or for the six month review investigation following the conservator's appointment. If possible, preserve notes on this background information even if none of it is included in reports to the court, and be prepared to discuss relevant portions of it with the examiner who will review the first accounting.

   b. Include findings in reports to the court and communicate with examiners about potential difficulties with accountings that they foresee. Significant apparent difficulties may:

      (1) Support a recommendation in an initial investigation report that appointment of counsel would be helpful to resolution of the matter or necessary to protect the interest of the proposed conservatee; or

      (2) May be relevant to the investigator's examination of the conservatee's finances or determination whether the conservator is acting in the best interest of the conservatee in a review investigation.

   c. Open an early dialogue with the appointed Probate Referee concerning a newly-appointed conservator who is having difficulty with the inventory and appraisal.

C. *Managing conservators and guardians whose files have been flagged*

1. Examiners may consider recommending a brief continuance of all or a portion of the settlement of a first accounting in an appropriate case to permit the investigator to complete the first annual review investigation and report before the accounting is approved by the court.

2. Investigators are encouraged to:

   a. If practicable, when interviewing a conservator with a flagged file as part of the first (six month) review investigation:

      (1) Briefly review with the conservator his or her recordkeeping practices and recommend appropriate changes.

      (2) Discuss and emphasize the requirements for conservators of estates prescribed in rule 7.1059(b) of the California Rules of Court.

      (3) Ask the conservator to review again and implement recommendations for estate management and recordkeeping contained in the Judicial Council of California's *Handbook for Conservators*.

      (4) Recommend to the conservator that he or she voluntarily participate in any training offered or sponsored by the court to nonprofessional conservators. Advise the court of these recommendations in their report, for possible later court-ordered participation.

      (5) Remind the conservator of the upcoming deadline for the first accounting and the importance of meeting that deadline and filing a complete accounting.

   b. Consider recommending to the court in appropriate cases that the court establish a firm date for the filing of the first accounting before the annual review date, subject to the sanctions of Probate Code section 2620.2 for failure to timely file the accounting.

D. *If an accounting and a conservatorship review investigation are not coordinated, and if time, workload, and resources permit*

1. It is recommended that examiners:

   a. Review the investigator's prior reports in the case when reviewing an accounting for its settlement. These may trigger lines of inquiry or examination and raise questions about the accounting.

b. Talk to the investigator about the conservatee's situation and the investigator's impressions about the conservator or any of the other persons involved in the case.

2. Investigators are encouraged to:

a. Review the last accounting in the file even if it is not coordinated with the current review investigation and even if it was approved by the court without a review investigation that specifically addressed it.

b. Become familiar with the first accounting in every case. The first accounting establishes a baseline to compare with all later accountings.

c. Compare the last accounting's income and expenditures and assets on hand with the conservatee's current living situation at the time of the next review investigation even if the accounting is for a period ending before the date of that review and even if the accounting was approved by the court. This comparison could spot problems that could be addressed at the next accounting or cause the court to take other remedial action before the next accounting is filed.

E. *What to look for in a conservatorship or guardianship accounting*

1. Examiners:

The examiner's review of a conservatorship or guardianship accounting for purposes of its settlement gives the examiner an opportunity to question any expenses that seem unreasonable. The following are examples of issues that may merit concern and additional scrutiny:

a. Are the costs of utilities, taxes, insurance, or repairs for the conservatee's real property charged to the conservatee's estate even though he or she is in a care facility?

b. Is there an excessive amount of money, compared to the size of the estate and other needs, expended for one service, e. g., $7,000 for monthly acupuncture when the total estate is under $100,000?

c. Are there entries for bank fees for insufficient funds?

d. Are there numerous entries for cash, credit card transactions, or reimbursements to the conservator or guardian with no explanation or a vague explanation of their use or purpose?

e. Are cash payments being made directly to the conservatee or ward without an allowance order?

f. Are the caregiver costs reasonable for the area served by the court? Is a relative of the conservatee or the conservator providing the care?

g. Are property rehabilitation or improvement expenditures reasonable for the area where the property is located and for the particular property?

h. What is the relationship between the conservator or guardian and any persons contracted to do work on the property of the estate?

i. In all cases, but particularly if there is a relationship between the conservator and the contractor, does the contractor hold the required licenses for the work, have appropriate experience and training for the job, and are the charges reasonable?

j. Is there a conflict of interest under rule 7.1059(a) of the California Rules of Court? The following are examples:

   (1) If an agency is acting as a conservator but also has a department that does home care, are all of the agency's conservatees receiving care from that department? Can that be justified?

   (2) Are employees or relatives of the conservator receiving payments from the estate for services that should be part of the conservator's request for compensation?

k. Is the conservatorship or guardianship estate invested and managed in accord with the requirements of rules 7.1059(b) or 7.1009(b) of the California Rules of Court?

l. Is there cash in a bank account or insured money market fund in excess of FDIC limits?

m. Are payroll taxes being paid for the caregiver? Should they be?

n. If the accounting is a second or later account, has the conservator or guardian improved on earlier accountings?

o. Does the conservator or guardian appear to understand rule 7.575 of the California Rules of Court and the proper use of Judicial Council forms for accounting schedules of standard or simplified accounts?

p. If the account is in the simplified account format under rule 7.575, should a recommendation be made to the court to require the account or future accounts to be prepared in the standard format?

2. Investigators

An investigator, unlike an examiner, has an opportunity to see the conservatee in his or her living situation. An investigator's review of the accounting enables the investigator to compare its representations of estate expenditures and income with the conservatee's actual circumstances.

a. If an investigator sees something of concern during an investigation, whether or not there is a current accounting to review, he or she should consider, if time permits, reviewing earlier accountings and investigation reports to see if the problem actually was apparent at an earlier stage of the case.

b. The following are examples of issues the investigator might see:

(1) Are there car payments, auto insurance, car maintenance, or gasoline expenses shown in the accounting when the conservatee is bedridden? If so, why?

(2) Is the automobile actually used entirely or even significantly for the conservatee's travel? What other uses does it have, and who uses it?

(3) If the accounting lists expenses for clothing, a television, a computer, or any other items, does the conservatee actually have access to and actually use them? If not, why not?

(4) Is the conservatee living in a care facility but has a home? Is the home rented for the benefit of the conservatee? If not, why not?

(a) Some reasons could be acceptable, e.g., the house is being rehabilitated so the conservatee can return to it, or the house is in such a state that it cannot be rented and must be either rehabilitated for this purpose or sold.

(b) Other reasons might not be acceptable, such as the conservator's family members or the conservatee's "friend" or former caregiver living in the residence without paying rent or paying under-market rent to the estate.

(5) If the accounting lists rehabilitation or improvement expenditures for the conservatee's real property, was the work actually done on that property?

F. *Coordination of the work of investigators and examiners*

1. Investigators may consider raising issues they see during their review investigations for examiners to address in the examiners' review of an accounting for settlement. Examples include:

   a. The conservatee is not actually receiving a court-approved cash allowance, directly or through a care facility's finance office.

   b. There is a pet but there are no expenses for it in the accounting. Or, there is no pet but expenses for it do appear in the accounting.

   c. The conservatee is living in a fashion that is not consistent with her former lifestyle or the size of her estate. (Note: Some wealthy conservatees do not want to live luxuriously—they acquired or preserved their assets by being frugal and they remain so.)

2. If investigators or examiners have strong concerns about an accounting, they should consider recommending to the court that the conservator or guardian be directed to produce original records and other documents for further investigation.

G. *Special concerns in reviewing the accountings of professional conservators and guardians and selecting accountings for audits or other special scrutiny*

1. If time, workload, and available court resources permit, investigators and examiners may consider reviewing and comparing current and past accountings of professional conservators in all or a representative number of their open cases pending in the court to see patterns of conservatee placements, relationships with medical and other service providers and care facilities, expenditures, asset investments, and requests for compensation.

2. Probate departments of courts located in areas with active professional fiduciaries may consider implementing a program to randomly select accountings of these fiduciaries for detailed scrutiny, including production of original documents, and submission of the accountings to forensic accountants or other experts appointed by the court. Professional fiduciaries should be advised in advance that their accountings filed in the court will be subject to this treatment.

3. Investigators or examiners who develop concerns about a professional fiduciary's accounting may consider recommending to the court closer review of that fiduciary's other matters in the court.

4. A court may consider advising probate departments of neighboring courts about any concerns about a professional fiduciary's accountings filed in that court.

5. Regular communication is encouraged between investigators and the Professional Fiduciaries Bureau concerning information about professional fiduciaries licensed by the bureau that have open matters in the investigators' court.

6. Accountings of nonprofessional conservators and guardians should also be randomly selected for detailed scrutiny, and these fiduciaries made aware that this is a possibility.

7. In the case of moderately-sized estates managed by nonprofessionals, this examination may take the form of audits of one or more particular individual transactions shown in an accounting rather than a full audit of the entire accounting, including an examination of all original documents in connection with particular receipts, investments, or disbursements, and verification of the actual use of any property purchased or leased.

Attachment A

Statutory Framework for Court Staff Review of Fiduciary Accountings in Conservatorships and Guardianships

A. *Timing of accountings and investigations*

1. Accountings in conservatorships and guardianships must be presented to the court for settlement and allowance (that is, filed, not necessarily heard or settled by the court within the time permitted) (Prob. Code, § 2620(a)):

   a. At the expiration of one year from the time of appointment; and

   b. Thereafter not less often than biennially, unless ordered more frequently by the court.

2. Post-appointment review investigations and reports by court investigators are required or authorized in conservatorships (there are no mandatory post-appointment review investigations in guardianships):

   a. At the expiration of six months after the initial appointment of the conservator (Prob. Code, § 1850(a)(1)); and

   b. One year after the appointment of the conservator and annually thereafter:

      (1) Unless the court at the first annual review and at each review thereafter elects to set the following full review and report in two years if the court determines that the conservator is acting in the best interests of the conservatee) (Prob. Code, § 1850(a)(2)).

      (2) In that event there is an investigation and report in the off-year, including a personal visit with the conservatee, but only a "status report" must be filed. The status report addresses whether (a) the conservatorship is still warranted, and (b) the conservator is continuing to act in the best interests of the conservatee.

      (3) The full review requires a more extensive full report than the status report. It is described in Probate Code section 1851(b)(1).

B. *Coordination of review investigations and accountings*

1. The court must, if feasible, coordinate conservatorship review investigations and the filing of conservators' accountings so that investigators may review accountings before visiting conservatees (Prob. Code, § 1851.2).

2. If practicable, during the review investigation the court investigator must review the accounting with a conservatee with sufficient capacity (Prob. Code § 1851(a)).

C. *Supporting documents filed with an accounting*

Conservators and guardians must file the following supporting documents with their accountings (Prob. Code, § 2620(c)):

1. Original account statements of all "institutions" under Probate Code section 2890 and "financial institutions" under section 2892[1] in which money or property of the estate are deposited. This means:

   a. For nonprofessional fiduciaries filing their first accounting, account statements showing the balances of each account immediately before the appointment date and as of the closing date of the account.

   b. For professional fiduciaries, account statements showing the account balances as of all periods covered by the accounting.[2]

   c. Original escrow closing statements for all real property sales reflected in the accounting.

   d. Original statements from residential care or long term care facilities where the conservatee resided during the period of the accounting.

D. *Format of the accounting*

1. Accounts of guardians and conservators must be presented in either the standard account or simplified account formats described in rule 7.575 of the California Rules of Court.

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[1] An "institution" is an insurance company, insurance broker, insurance agent, investment company, investment bank, securities broker-dealer, investment adviser, financial planner, financial adviser, or any other person who takes, holds, or controls an asset subject to a conservatorship or guardianship that is not a "financial institution." The latter is a bank, trust, savings and loan association, savings bank, industrial bank, or credit union.

[2] Probate Code section 2620(c), as amended by Stats. 2008, ch. 293 (Assem. Bill 1340), § 9, effective January 1, 2009.

a. All account filers may choose to use the standard account format (rule 7.575(b));

b. The standard account format must be used if:

(1) The estate includes income real property;

(2) The estate includes an interest in a trade or business;

(3) The appraised value of the estate is $500,000 or more, exclusive of the conservatee's or ward's residence;

(4) The receipts or disbursements schedules prepared in the simplified format exceed five pages in length;[3] or

(5) The court directs that a standard account must be filed. (Rule 7.575(b).)

c. The essential difference between a standard account and a simplified account is that in the former, the schedules for receipts and disbursements show the entries in subject-matter categories with subtotals of each, while simplified accounts show entries in these schedules in chronological order without subtotals and without regard to the subject matter of each receipt or disbursement (rule 7.575(a)).

c. Judicial Council forms of a summary of account and the schedules supporting the summary for both the standard and simplified accounts have been adopted (mandatory) or approved (optional).

(1) Forms designated as GC-400(x) are standard account forms. Those designated as GC-405(x) are simplified account forms. Forms with both designations (GC-400(x)/GC-405(x)) are used in both formats (rule 7.575(d)).

(2) The *Summary of Account* (form GC-400(SUM)/GC-405(SUM)) must be used in all accounts. (See rule 7.575((e)(1).)

(3) Standard account filers may use their own supporting schedules instead of the Judicial Council forms for these schedules, but the information provided must be equivalent to the information requested in the forms (rule 7.575(e)(2)).

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[3] If an account must be prepared in the standard account format solely because of the length of one of these schedules, the account filer may choose to prepare only that schedule in the standard format.

(4) Simplified account filers must use the Judicial Council forms for supporting schedules (rule 7.575(e)(1)).

E. *Additional powers of the court*

1. In response to an investigator's report, the court may (a) order a (further) review or (b) order an accounting (Prob. Code, § 1850(a)(1));

2. On its own motion or on request by any interested person, the court may order a review (including a court hearing) at any time, and may also order an accounting (Prob. Code, § 1850(b)).

3. The court may subject an accounting to a random or discretionary full or partial review, which may include consideration of any information necessary to determine the accuracy of the accounting (Prob. Code, § 2620(d)).

4. On reasonable notice, the court may compel conservators and guardians to make available for inspection and copying by any person designated by the court, all books and records, including receipts for any expenditures (Prob. Code, § 2620(e)).

5. The court has discretion to appoint counsel for the conservatee or ward under Probate Code section 1470 in connection with a conservator's or guardian's petition for settlement of an accounting if the court concludes that the conservatee or ward is not otherwise represented by counsel and the appointment would be helpful to the resolution of the matter or is necessary to protect the conservatee's or ward's interests (Prob. Code, § 1470).

   a. Reasonable fees and expenses fixed by the court for appointed counsel in a conservatorship are to be paid by the estate of the conservatee (Probate Code section 1470(c)(1)).

   b. The county, not the court, must pay for any portion of the reasonable fees and expenses of appointed counsel for a ward in a guardianship that the court determines that the minor's estate and the minor's parents are financially unable to pay (Prob. Code, § 1470(c)(3), added by Stats. 2007, ch. 719 (Sen. Bill 241), § 1).

   c. Counsel for the conservatee or ward, including appointed counsel, may object to an accounting, thereby subjecting the accounting to fully contested litigation.

6. After January 1, 2008, the surety bonds of conservators and guardians must include a reasonable amount, fixed by rule of court, for the cost of recovery on the bond, including attorneys' fees and costs. (Prob. Code, § 2320(c)(4), Cal. Rules of Court, rule 7.207).

   a. The cost of recovery on the bond includes fees and costs incurred in a successful action for surcharge against a conservator or guardian.

   b. These fees and costs must be paid by the surety bond if the fiduciary does not pay them.

   c. A surcharge against a conservator or guardian eligible for an award of attorney fees and costs under section 2320 may arise from successful objections to an accounting by appointed counsel for the conservatee or ward.

Item SPR09-44 Response Form

Title: **Guidelines for Probate Examiners and Court Investigators to Assist Them in Reviewing Accountings of Conservators and Guardians and Detecting Fraud** (adopt and authorize distribution of guidelines)

☐ **Agree** with proposed changes

☐ **Agree** with proposed changes **if modified**

☐ **Do not agree** with proposed changes

Comments: _____

_____

_____

_____

_____

_____

_____

Name: _____ **Title:** _____

Organization: _____

☐ **Commenting on behalf of an organization**

Address: _____

City, State, Zip: _____

To Submit Comments

Comments may be submitted online, written on this form, or prepared in a letter format. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments. You are welcome to email your comments as an attachment.

Internet: http://www.courtinfo.ca.gov/invitationstocomment/

Email: invitations@jud.ca.gov

Mail: Ms. Camilla Kieliger
Judicial Council, 455 Golden Gate Avenue
San Francisco, CA 94102

Fax: (415) 865-7664, Attn: Camilla Kieliger

DEADLINE FOR COMMENT: 5:00 p.m., Wednesday, June 17, 2009

Circulation for comment does not imply endorsement by the Judicial Council or the Rules and Projects Committee. All comments will become part of the public record of the council's action.

MEMORANDUM

By: Andrew Zabronsky
Re: Request to Incap and TEXCOM re SB 1140
Date: 6/1/09

SB 1140 became law effective January 1, 2009. Among other things, it amends Welfare and Institutions Code section 15610.30 to make clear that financial elder abuse may be committed by obtaining a "testamentary bequest" by "undue influence, as defined in section 1575 of the Civil Code." Internally, TEXCOM voted to support SB 1140 if amended to delete or sufficiently water down the reference to "undue influence." No such amendment was made. Apparently, TEXCOM took no official position one way or the other. The minutes do not reflect any discussion on the "testamentary bequest" provision.

The "testamentary bequest" provision strikes me as a terrible problem. Coupled with the "undue influence" provision, it means that virtually *every* will/trust contest will become an elder abuse action. This will do nothing to protect the elder—who will already be dead by the time of the contest, and had no property taken from them during their lifetime in any event. Instead, it will benefit the contestant, who (for no good reason) will get the benefit of one-way fee shifting and potential punitive damages (§ 15657.5)—all the goodies that elders get. It is one thing to stack the deck in favor of elders who have their property taken from them, but it is quite another to stack the deck in favor of contestants over proponents of the will/trust. If anything, that would seem to get the policy issue exactly backwards.

In addition, the new law seems to stack the deck in favor of contestants substantively as well. The new law expressly adopts the standard for undue influence set forth in Civil Code section 1575. That is the standard for vitiating an (inter-vivos) contract on the ground that consent thereto was not free. (Civ. Code §§ 1565-1567.) Until now, it did not expressly apply to actions to invalidate a testamentary instrument. The contract standard—"taking an unfair advantage of another's weakness of mind"—seems substantially lower than the standard usually applied in will/trust contest—"destroy the testator's free agency and substitute for his own another person's will" (*Estate of Arnold* (1940) 16 Cal.2d 573, 577). Thus, it appears a contestant can now win compensatory damages, attorney fees and punitive damages on evidence that would be insufficient to invalidate the will.

I move that Incap report and recommend whether we should go along with this travesty and, if not, what to do about it.

TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

TO: Laura Goldin
Executive Director, Conference of Delegates of California Bar Associations

FROM: Trust & Estates Section of the State Bar of California

DATE: May 22, 2009

RE: 2009 Resolutions

1. Resolution 05-05-09 - Marital Property: Revocable Estate Planning Documents Not Evidence of Transmutation

OPPOSE

Trusts and Estates Section of the State Bar of California Counterargument

The Trusts and Estates Section opposes this resolution because its basic premise is flawed and overbroad. The amendment states that "a revocable trust or other revocable instrument which is not intended to take effect until the death of the person creating the instrument regarding the character of property" is not admissible as evidence of a transmutation of the property in a proceeding commenced before the death of the person who made the ... trust or other instrument. It is not clear whether the author intended that revocable trusts are in a class of documents not intended to take effect until the death of the person creating the instrument. Estate planners often draft integrated documents for married persons and domestic partners. Such documents may include a joint revocable trust, powers of attorney, and property agreements. They are usually intended to be effective upon execution, and, in the case of revocable trusts and property agreements, may satisfy Family Code section 853. The proposal perpetuates the common misperception that trusts are merely "will substitutes."

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California.

Membership in the TRUSTS and ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

2. Resolution 09-01-09

OPPOSE

Trusts and Estates Section of the State Bar of California Counterargument

While there is admittedly a problem in the area of attorney retention of documents when the attorney is neither incapacitated nor dead, this resolution does not solve the problem. This resolution would provide that an attorney no longer has a duty to use ordinary care in dealing with client documents once the attorney has mailed notice to the client to reclaim the documents at the client's last known address. There are a multitude of reasons why such a mailing might not reach the client or that the client might not reach the attorney to reclaim the documents within 90 days of notification. Allowing the attorney to destroy the documents at that time, or to fail to use ordinary care, risks the possibility of disclosure of client secrets and destruction of valuable client documents. The alternative to lodge documents with the clerk of the superior court in the relevant county will merely cause a burden on the courts.

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3. Resolution 12-03-09

OPPOSE

Trusts and Estates Section of the State Bar of California Counterargument

The goal to levy on a settlor's interest in a revocable trust is not achieved by this resolution. Literally, by its wording – "no court shall be required to enforce such claims" – it suggests that a creditor need not obtain any judgment in order to enforce a claim. If the goal is that the creditor should be able to levy on the debtor's interest in any trust revocable by the debtor, then the proposed amendments ought to state so clearly. This resolution fails to do so.

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California.

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4. Resolution 12-04-09 Elder Abuse: Standing to seek protective Order

OPPOSE

Trusts and Estates Section of the State Bar of California Counterargument

This proposal would confer standing to seek a protective order on an elder or dependent's conservator or, if there is no conservator, essentially any "interested" person. First, this proposal ignores the fact that Probate Code Section 2462 already authorizes a conservator to bring in an action for a Conservatee. Thus, the proposal contains unnecessary language. Further, the term "interested person" is too broad, providing no serious parameters as to standing in bringing such an action. This would allow laws that seek to protect elders to do more harm than good in allowing almost anyone to bring an action interfering with the care and relationship a senior citizen may have with others. Since it is both too broad and contains unnecessary language, the Trust & Estates Section of the State of Bar opposes this resolution

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California.

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5. Resolution 12-05-09

OPPOSE

Trusts and Estates Section of the State Bar of California Counterargument

The Trusts & Estates Section of the State Bar believes that this proposal, while it attempts to solve a problem of standing, will likely raise more issues by creating an overly broad standing for a cause of action for abduction and return of an elder to this state from other jurisdictions. Under this proposal, any interested person would have standing to bring a claim both for damages and to return an elder to this state. It is not clear whether the standing issue has prevented appropriate actions to date, but broadening the standard to include persons other than the elder or a legal representative of the elder would likely have unintended consequences, including multiple claims in multiple jurisdictions. The Trusts & Estates Section is also aware that there is now a Uniform Guardianship Law which has been approved by NCCUSL and is being proposed for adoption in the fifty states. To the extent that this resolution would affect cross-jurisdictional issues, since it provides for return of an elder to this state, the proposal should be studied in conjunction with the Uniform Guardianship Law so as to coordinate jurisdictional issues among states.

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California.

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6. Resolution 12-06-09

OPPOSE

Trusts and Estates Section of the State Bar of California Counterargument

A transfer on death deed has been recognized as an available form of transfer since *Tennant v. John Tennant Memorial Home*, 167 Cal.570 (1914). That case and following cases continue to be good law. Legislation regarding whether transfer of death deeds should be part of legislation under California was first introduced in 2005. That legislation was then turned into a study bill for the California Law Revision Commission in 2006. The California Law Revision undertook a study of the proposal and as part of the study found multiple issues that relate to the creation of a transfer on death deed. That proposal was introduced as legislation as AB 250 in 2007. The bill did not pass due to continuing issues as to the appropriateness of its enactment in California. The issues with transfer on death deeds have been well documented in the California Law Revision Commission study and multiple oppositions to the past proposed legislation. The most common problems expressed are unintended consequences of the transferors and the potential for abuse of seniors if these deeds are made too easily available to predators. An example under the resolution of an area of problem relates to spouses who hold title as joint tenancy. Under the resolution, if the spouses name a beneficiary of their property, the joint tenancy is severed and the property passes to the beneficiary at the death of the first spouse. Most spouses would not understand that this would be the result and would certainly not understand those consequences from a form, even though the proposal does contain the language proposed by the Trusts and Estates Section of the State Bar of California in the warnings. Additionally, the resolution indicates that it is intended to provide a method for seniors to provide transfers of their property. However, there is a large problem with financial elder abuse to seniors in California and providing this additional mechanism for potential abuse will not serve seniors.

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7. Resolution 12-09-09

OPPOSE

Trusts and Estates Section of the State Bar of California Counterargument

California law has long held a standard that unless a trust provides otherwise a trust remains revocable under Probate Code Section 15400 whether such trust is established for one or more settlors. This resolution states there is no presumption in multiple settlor trusts. However, the current law is clear that the trust is revocable until the death of the final settlor unless the trust states the contrary. Therefore, this resolution seeks to overturn the existing California presumption without providing any reason why such presumption is defective. California took the position that settlers would state their intention of irrevocability if that was the intent of the settlors. No adverse consequences result from such presumption. Spouses, who are the most common to prepare a multiple settlor trust, often intend that their entire share of the trust pass to the surviving spouse and that the surviving spouse continue to have the ability to amend or revoke the trust in any manner they desire. Having the presumption of revocability creates simplicity for small estates that are still held in the trust due to the probate limits. It allows that a trust remain effective until the death of the second settlor without the need to create separate trusts at the death of the first settlor. It reduces the cost of administration as the original trust continues in effect as a revocable trust. This resolution assumes that settlers do not intend this result, which is incorrect. This resolution should fail as there is no adverse consequence in the current state of the law and there is a benefit to the current presumption by allowing spouses to create a trust that is revocable until the death of the second spouse thus allowing the first spouse maximum flexibility over the funds without the need to create a new trust at the death of the first spouse.

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California.

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8. Resolution 12-10-09

OPPOSE UNLESS AMENDED

Trusts and Estates Section of the State Bar of California Counterargument

In light of *Masry v. Masry* section 15401 needs to be amended in order to require a settlor revoking his or her interest in a joint trust to give notice to the other settlor of his or her revocation. The proposed resolution requires notice and provides a bright-line requirement that the revoking co-settlor must give the notice within 10 days of the revocation. The proposed

resolution stops short, however, of clearly stating the consequences when notice is not given at all or within the 10 day period. The proposed resolution should identify the consequences of failure to adhere to the section; *e.g.* is the proposed revocation void if not given to the other settlor within10 day and, therefore, the revoking settlor, will have to revoke the trust again in order to properly comply with the requirements of the section and effect revocation. Or, for example, does the failure to meet the 10 day requirement merely delay the effective date of the resolution if the revoking settlor does give notice. The proposed resolution needs to identify the consequences in order to completely address the issues *Masry v. Masry* raises.

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9. Resolution 12-11-09

OPPOSE

Trusts and Estates Section of the State Bar of California Counterargument

The resolution would modify the thrust of Probate Code Section 16061.5, which presently requires notification when part or all of a trust becomes irrevocable, to make the trustee provide notice simply on the death of a settlor, regardless of whether any part of the trust becomes irrevocable. By confusing an irrevocable gift—the passage of property from a deceased settlor to a living settlor—with irrevocability of the trust, the resolution will create unnecessary burdens on trustees and do nothing more than state the obvious—that a settlor has died--to those receiving notice.

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California.

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10. Resolution 12-12-09:

OPPOSE

Trusts and Estates Section of the State Bar of California Counterargument

Resolution 12-12-2009 proposes to amend Revenue & Taxation Code sections 17742 - 17745 to remove the residence of a non-contingent California beneficiary as a basis for the taxation of a trust's accumulated income and capital gain. The Trusts and Estates Section of the California State Bar opposes the proposed amendments on the following grounds. Any legislative fix to these issues must, at a threshold, be revenue neutral. The proposed amendments are not revenue neutral: they label the beneficiary prong as problematic and do away with it, without proposing another method to make up for lost revenue. Although California is only one of four states that will tax a trust based solely on the residence of a beneficiary, California's scheme in this regard was upheld by the California Supreme Court in *McCulloch v. Franchise Tax Board* (1964) 61 Cal 2d 186. California *does* provide a credit for taxes paid to other states under Rev. & Tax. sections 18004 and 18005. What the beneficiary prong needs is clarification so that planners and taxpayers can decide whether to pay the tax based on a clear law rather than speculation and rumors (as is currently the case). The proposal continues the other basis for taxation, that a "fiduciary" resides in California, despite the fact that this basis, as enforced in California, is seriously flawed (as illustrated by the recent King/Tunney Board of Equalization decisions *(Yolanda King Family Trust* and *Mary Tunney Junior Trust*, Nos. 357825 and 357829 (October 2, 2007))) and also discourages trust business in California, hurting its tax base and status as a financial center. While the Trusts and Estates Section applauds any effort to fix California's unfair and unworkable fiduciary income tax scheme, the proposed amendments do not adequately address the scheme's core problems: the statutes discourage trust business, are ambiguous, overbroad, and have been interpreted by practitioners, the Franchise Tax Board, and the Board of Equalization so as to render them almost completely ineffectual.

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California.

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CEB TRUSTS AND ESTATES SEMINARS
for
Fiscal Year 2009-2010
(July 2009 - June 2010)

MONTH	SEMINAR	HOURS
July/Aug	• Planning for the Small and Mid-Size Estate	3
	• Death, Debts and Taxes: Creditors' Claims Against a Decedent	3
Oct/Nov	• Fundamentals of Elder Law Practice (October)	12
	• FLPs and LLCs: Their Use in Family Wealth Transfers	6
Nov/Dec	• Special Needs Trust Administration	3
	• Managing the Wealth of an Incapacitated Person	3
Jan	• Estate Planning and Administration: 25th Annual Recent Developments	3
	• Practical Problems in Trust Administration	3
Feb/Mar	• Revocable Trusts I - Drafting Basics	3
	• Revocable Trusts II - Tricky Clauses	3
Apr/May	• Gaw on Subtrust Funding	6
	• Fundamentals of Postmortem Trust Administration	12
May/Jun	• The 32nd Annual UCLA/CEB Estate Planning Institute (5/14 & 5/15/2010)	12
	• Special Assets in Estate Planning	3
	• Estate Asset Management	3

ARTICLE 10. ELECTIVE ADMINISTRATION OF DECEDENTS' ESTATES

§8600. Application of Article; Conflict with other provisions of the Probate Code.

The provisions of this Article shall prevail over all other provisions of the Probate Code, unless the context otherwise requires, or unless such other provision directly applies to the proceeding or circumstance at issue.

§8601. Petitioner.

The term "Petitioner" means the person or Trustee who is permitted to file a petition to commence Elective Administration proceedings under this Article.

§8602. Elective Administration.

The term "Elective Administration" means the administration of a decedent's property pursuant to the provisions of this Article and shall include both Elective Appointment and Elective Probate.

§8603. Elective Appointment.

The term "Elective Appointment" means the Elective Administration procedure for the appointment of a personal representative under this Article.

§8604. Elective Probate.

The term "Elective Probate" means the Elective Administration procedure for the probate of a decedent's will under this Article.

§8605. Qualifying Estates

The term "Qualifying Estate" shall refer to any one of the following:

(a) The Petitioner is an individual and is the sole devisee of the decedent's will entitled to distribution.

(b) The Petitioner is a trustee and is the sole devisee of the decedent's will entitled to distribution.

(c) The Petitioner is a trustee and is the sole residuary devisee of the decedent's will, and the decedent's will is a pour-over will. For purposes of this section, a pour-over will is a will (1) by which the residue is devised to the trustee of an existing trust of which the decedent was the settlor and could have revoked before death, (2) the total gross value of the non-residuary devises in the will does not exceed the dollar limitation of Section 13100, and (3) no devisee, excluding contingent devisees not entitled to distribution, has filed a written objection to administration under this Article.

(d) The Petitioner is the decedent's sole heir and there is no will.

(e) All devisees of the decedent's will entitled to distribution are adults and have consented in writing to the Petitioner administering the decedent's estate without bond and without court supervision under this Article. For purposes of this subsection, a person is "entitled to distribution" if, when the petition is filed, that person has satisfied all pertinent conditions in the decedent's will, including any requirement of survivorship.

§8606. Restrictions on Commencement of Elective Administration

Elective Administration of a decedent's Qualifying Estate may be commenced under this Article by a Petitioner unless:

(a) A proceeding for the court-supervised administration of the decedent's estate is pending under Chapter 1 (commencing with Section 8000) of Part 2 of this division; or

(b) The decedent's will precludes Elective Probate or Elective Administration under this Article.

§8607. Filing of Petition to Commence Elective Administration

At any time after a decedent's death, any interested person may commence proceedings under this Article for Elective Administration of the estate of the decedent by a petition to the court for an order determining the date and place of the decedent's death and for either of the following:

(a) Elective Appointment of a personal representative.

(b) Elective Probate of the decedent's will.

§8608. Contents of Petition; attachment of will.

(a) The petition shall contain all of the following information:

(1) The date and place of the decedent's death.

(2) The street number, street, and city, state or other address, and the county, of the decedent's residence at the time of death.

(3) The name, age, address, and relation to the decedent of each heir and devisee of the decedent, so far as known to or reasonably ascertainable by the petitioner.

(4) The name of the person for whom appointment as personal representative is petitioned.

(5) The character and estimated value of the property in the estate.

(6) That the petitioner requests Expanded Authority under the Independent Administration of Estates.

(b) If the decedent left a will:

(1) The petitioner shall attach to the petition a photographic copy of the will. In the case of a holographic will or other will of which material provisions are handwritten, the petitioner shall also attach a typed copy of the will.

(2) If the will is in a foreign language, the petitioner shall attach an English language translation. On admission of the will to probate, the court shall certify to a correct translation into English, and the certified translation shall be filed with the will.

(3) The petition shall state whether the person named as executor in the will consents to act or waives the right to appointment.

§8609. Hearing; time.

The hearing on the petition shall be set for a day not less than 15 nor more than 30 days after the petition is filed. At the request of the petitioner made at the time the petition is filed, the hearing on the petition shall be set for a day not less than 30 nor more than 45 days after the petition is filed. The court shall not shorten the time for giving the notice of hearing under this section.

§8610. Notice of hearing; contents

The notice of hearing of a petition for elective administration of a decedent's estate shall state substantially as follows:

NOTICE OF PETITION FOR ELECTIVE ADMINISTRATION

ESTATE OF _____, ESTATE NO _____

To all heirs, beneficiaries, and persons who may be otherwise interested in the will or estate, or both:

Notice is hereby given that _____ has filed in the Superior Court of California, County of _____, the following (check applicable boxes):

[__] Petition for elective probate of the decedent's will dated _____

[__] Petition for elective appointment of the following as personal representative of the estate

Name: _____
Address: _____
Telephone: _____

Petitioner is:

[__] An individual and is the sole devisee of the decedent's will entitled to distribution.

[__] A trustee and is the sole devisee of the decedent's will entitled to distribution.

[__] A trustee and is the sole residuary devisee of the decedent's will, and the decedent's will is a pour-over will. For purposes of this section, a pour-over will is a will (a) by which the residue is devised to the trustee of an existing trust of which the decedent was the settlor and could have revoked death, (b) the total gross value of the non-residuary devises in the will does not exceed the dollar limitation of Section 13100, and (c) no devisee, excluding contingent devisees not entitled to distribution, has filed a written objection to administration under this Article.

[__] The decedent's sole heir and there is no will.

[__] All devisees of the decedent's will entitled to distribution are adults and have consented in writing to the Petitioner administering the decedent's estate without bond and without court supervision under this Article.

The petition is set for hearing in Dept. No _____ at ____(Address)_____ on ____Date of Hearing_____ at _____Time of Hearing_____.

YOU HAVE THE RIGHT TO:

(1) Object to the elective probate of the decedent's will or to the elective appointment of the personal representative, and

(2) Require that the court supervise the administration of the decedent's estate.

UNLESS OBJECTIONS ARE RECEIVED by the above-referenced court, the clerk on or after_____ may act to (check applicable boxes):

[__] Admit the decedent's will to probate

[__] Appoint _____ as personal representative of the estate

IF YOU OBJECT to the granting of the petition, you should appear at the hearing and state your objections or file written objections with the court before the hearing. Your appearance may be in person or by your attorney

Upon appointment, the personal representative may administer the estate with Expanded Authority under the Independent Administration of Estates without court supervision and will have full power to possess, control and manage the assets of the estate, incur and pay costs of administration, fees to the personal representative and attorney and distribute the property of the estate in accordance with the will of the decedent or the laws of the State of California.

As a beneficiary of an estate subject to administration without court supervision, you have important rights which include, but are not limited to, the following:

1. The right to receive a copy of the petition for appointment of the personal representative and a copy of the decedent's will, if any;

2. The right to receive an inventory of the estate assets;

3. The right to receive information concerning all receipts and disbursements of estate assets during the administration of the estate;

4. The right to receive information concerning the compensation to be paid to the personal representative or to the attorney for the personal representative; and

5. The right to receive within twelve months after the appointment of the personal representative:

(i) Distribution of the estate assets to which you are entitled as a beneficiary, or

(ii) A status report from the personal representative which explains why the estate cannot be distributed and provides an estimate of the additional time required for distribution.

As a beneficiary, you are entitled to enforce the above rights, either by contacting the personal representative directly or through an attorney of your choice. In addition, if the personal representative fails to comply with any of the above requirements, you may file a petition to compel compliance with the Court.

§8611. Service of notice

At least 15 days before the hearing of a petition for elective administration of a decedent's estate, the petitioner shall serve notice of the hearing by mail or personal delivery on all of the following persons:

(a) Each heir of the decedent, so far as known by or reasonably ascertainable by the petitioner;

(b) Each devisee, executor and alternate executor, named in any will being offered for probate, regardless of whether the devise or appointment is purportedly revoked in a subsequent instrument;

(c) Each trustee and beneficiary of a trust; and

(d) Each person who has filed a Request for Special Notice with the court under Section 8613.

(e) Each public entity to which notice is required under Section 9202 of this division.

§8612. Request for Special Notice

(a) At any time after the Petition for Elective Probate is filed under this Article, any person interested in the estate, whether as devisee, heir, creditor, beneficiary

under a trust, or as otherwise interested, may in person or by attorney, file with the court a written request for special notice.

(b) The request for special notice shall be so entitled and shall set forth the name of the person and the address to which notices shall be sent.

(c) Special notice may be requested of one or more of the following matters:

(1) Petitions or any other pleadings filed with the court in the administration proceeding.

(2)Notice of proposed action provided under Chapter 4 (commencing with Section 10580).

(3) Distributions of property to beneficiaries and heirs.

(d) Special notice may be requested of any matter in Subdivision (c) by describing it, or of all the matters in Subdivision (c) by referring generally to "the matters described in Subdivision (c) of Section 8612 of the Probate Code" or by using words of similar meaning.

(e) A copy of the request shall be personally delivered or mailed to the personal representative or the attorney for the personal representative. If personally delivered, the request is effective when it is delivered. If mailed, the request is effective when it is received.

(f) When the original of the request is filed with the court, it shall be accompanied by a written admission or proof of service.

(g) A request for special notice under this chapter may be modified or withdrawn in the same manner as provided for the making of the initial request.

§8613. Hearing; examination and compelling attendance of witnesses; matters to be established.

(a) At the hearing on the petition, the court may examine and compel any person to attend as a witness concerning any of the following matters:

(1) The time, place, and manner of the decedent's death.

(2) The place of the decedent's domicile and residence at the time of death.

(3) The character and value of the decedent's property.

(4) Whether or not the decedent left a will.

(b) The following matters shall be established:

(1) The jurisdictional facts, including:

(A) The date and place of the decedent's death.

(B) That the decedent was domiciled in this state or left property in this state at the time of death.

(2) The existence or nonexistence of the decedent's will.

(3) That notice of the hearing was served as provided in Section 8612 of this Article.

§8614. Appearances and responses or objections; interested persons.

An interested person may appear and make a response or objection as provided in Section 1043 to the petition for Elective Administration.

§8615. Establishment of jurisdictional facts; order determining time and place of death and jurisdiction, admitting will to probate, and appointing personal representative; effect of defect of form or error in petition.

(a) If the court finds that the matters referred to in paragraph (1) of subdivision (b) of Section 8613 are established, the court shall make an order determining the time and place of the decedent's death and the jurisdiction of the court. When appropriate and on satisfactory proof, the order shall admit the decedent's will to probate and appoint a personal representative. The date the will is admitted to probate shall be included in the order.

(b) If through defect of form or error the matters referred to in paragraph (1) of subdivision (b) if Section 8613 are incorrectly stated in the petition but actually are established, the court has and retains jurisdiction to correct the defect or error at any time. No such defect or error makes void an order admitting the will to probate or appointing a personal representative or an order made in any subsequent proceeding.

§8616. Inventory and appraisal.

An inventory of the estate of the decedent shall be provided to any beneficiary upon request. No inventory and appraisal is required to be filed with the Court in an Elective Administration proceeding under this Article.

§8617. Notice to Creditors.

Except as otherwise required, no notice to creditors is required in an Elective Administration proceeding under this Article.

§8618. Claims of a Creditor.

Nothing in this Article affects the liability of the probate estate, if any for the claims of a creditor and the personal representative is not liable to the extent the claim is paid out of the probate estate.

§8619. Liability for decedent's debts; limitations; defense, cross complaints, or setoffs.

(a) Subject to subdivisions (b), (c), and (d), each person who receives the decedent's property under this Article is personally liable for the unsecured debts of the decedent.

(b) The personal liability of each person shall not exceed the fair market value at the date of the decedent's death of the property received by that person under this Article, less the amount of any liens and encumbrances on the property.

(c) In any action or proceeding based upon an unsecured debt of the decedent, each person who receives property under this Article may assert any defense, cross-complaint, or setoff which would have been available to the decedent if the decedent had not died.

(d) Nothing in this section permits enforcement of a claim that is barred under Part 4 (commencing with Section 9000) of this division.

(e) Section 366.2 of the Code of Civil Procedure applies to any action under this section.

§8620. Authority to administer estate under expanded authority under the Independent Administration of Estates Act.

(a) Subject to the limitations and conditions of this Article, a personal representative who has been granted Expanded Authority to administer the estate under the Independent Administration of Estates Act may exercise the powers granted under Articles 1, 2 and 3 of Chapter 3 of Part 6 of this Division 7 without court authorization, instruction, approval or confirmation.

(b) In addition to the powers exercisable without court supervision granted to the personal representative of expanded authority to administer the estate under Part 6 of this Division 7, the personal representative may exercise the trustee powers, described in §§16220-16249 of Chapter 2 of Part 4, without court authorization, instruction, approval or confirmation.

(c) Any interested person may petition the court concerning the administration of the estate by a personal representative with Expanded Authority.

§8621. Personal representative responsibility; person entitled to distribution demand and suit to recover; release.

(a) The personal representative is responsible for distribution of the property in the estate in accordance with the will of the decedent or the laws of the State of California.

(b) Each person entitled to distribution from the estate may demand and recover from the personal representative or any person in possession, property to which the person is entitled.

(c) The personal representative shall provide upon request to each person entitled to distribution a report of information about the assets, liabilities, receipts, and disbursements of the estate, the acts of the personal representative, and the particulars relating to the administration of the estate.

(d) The personal representative is entitled to a full release only upon the provision to each person entitled to distribution from the estate a report of information about the assets, liabilities, receipts, and disbursements of the estate as of the end of the period of administration of the estate, the total fees paid or payable to the personal representative and the personal representative's attorney in connection with the administration of the estate.

§8622. Personal Representative and Attorneys Fees.

The personal representative may receive reasonable fees for services performed in connection with the filing of a petition and other actions performed under this Article without prior court approval.

The attorney's fees for services performed in connection with the filing of a petition and other actions performed under this Article shall be reasonable and determined by private agreement between the attorney and the client without prior court approval.

§8623. Statute of Limitations.

No action may be commenced against the personal representative or a successor in interest to the personal representative more than four years after the initial order granting authority to administer the estate under this Article, except for actions to confirm title to the estate's assets to a successor in interest and claims for expenses of administration.

Summary of Proposed EADE Draft

Introduction:

EADE proceedings provide persons interested in the devolution of a decedent's estate with flexibility and limited court involvement.

EADE proceedings are codified in a separate Article that is located in Part VII. All of the relevant provisions are contained in one Article, with a limited cross-reference to Part 6 (IAEA).

When Is It Applicable:

EADE is permitted only in a limited set of circumstances:

1. The Petitioner is an individual and is the sole devisee of the decedent's will entitled to distribution.
2. The Petitioner is a trustee and is the sole devisee of the decedent's will entitled to distribution.
3. The Petitioner is a trustee and is the sole residuary devisee of the decedent's will, and the decedent's will is a pour-over will. For purposes of this section, a pour-over will is a will (1) by which the residue is devised to the trustee of an existing trust of which the decedent was the settlor and could have revoked before death, (2) the total gross value of the non-residuary devises in the will does not exceed the dollar limitation of Section 13100, and (3) no devisee, excluding contingent devisees not entitled to distribution, has filed with the clerk a written objection to administration under this article.
4. The Petitioner is the decedent's sole heir and there is no will.
5. All devisees of the decedent's will entitled to distribution are adults and have consented in writing to the Petitioner administering the decedent's estate without bond and without court supervision under this article. For purposes of this subsection, a person is "entitled to distribution" if, when the

petition is filed, that person has satisfied all pertinent conditions in the decedent's will, including any requirement of survivorship.

Highlights of the Process:

- EADE is initiated by a noticed petition to the Court with a hearing.
- No publication is required.
- No bond is required.
- The order appointing the personal representative and/or admitting a will is a final adjudication subject only to vacation on limited grounds and reversible only on appeal.
- After the initial court order of appointment, the court's involvement ends.
- No inventory and appraisal is required to be filed with the Court. Only upon request, an inventory shall be provided to any beneficiary.
- There is no creditor's claims process. No notice to creditors is required.
- Distributees will be liable for any debts.
- The personal representative may exercise all powers under a grant of Expanded Authority under the IAEA.
- Expanded Authority includes all powers available under IAEA, under trust law, and even those that cannot be exercised without

court supervision. All powers can be exercised without a Notice of Proposed Action.

- No final report and/or accounting is required to be filed with the court. Only upon request, the personal representative shall provide a report of information to each person entitled to distribution in the estate.

- Any interested person may petition the court concerning the administration of the estate by a personal administrator with Expanded Authority.

- The personal representative will be held liable to the beneficiaries for distribution.

- There is a four year statute of limitations.

Neil Horton

From: Neil Horton
Sent: Saturday, May 30, 2009 4:55 PM
To: Ed Corey; May Lee Tong; Margaret Lodise; Peter Stern; Barry Matulich; rehrman@thoits.com; trustlawyer86@yahoo.com
Subject: RE: Fiduciary self representation (adoption of proposed rule 7.15, changes in substitution of attorney forms)

Ed, May, et. al.,

I recommend that Texcom agree to Proposed Rule 7.15. The rule is not ideal. For example, Rule 7.15(b) treats a trust as a legal entity, like an estate, and is not explicit that a trustee who has the power to revoke a trust and who would succeed to the corpus on revocation may represent herself in a civil case. But Proposed Rule 7.15(b) does adequately distinguish between a self-represented fiduciary who seeks to fulfill a fiduciary duty and a self-represented fiduciary who seeks relief from, or defends against a claim by, a third party. The Judicial Council has considered this proposal for more than four years. There is no guaranty that further consideration by all the interested parties would result in an improved version of the rule. It is past time for this rule to be available to guide judges, attorneys, and fiduciaries.

I also recommend that we not seek to change proposed revised forms MC-050, MC-051, or MC-053. The forms contain multiple warnings to unrepresented litigants to seek legal counsel. The forms also tell fiduciaries that "you may act as your own attorney in most matters governed by the Probate Code, but you may NOT proceed without an attorney in most other court matters, including some matters governed by that code. See rule 7.15 of the California Rules of Court." One may criticize the form as not sufficiently specific in advising a lay person what is permissible and what is forbidden. The inherent problem, however, is that more specificity breeds greater complexity and lessens the likelihood that the lay person will understand what is required.

If Texcom agrees with this memorandum, I will submit the response form on-line by checking the box to indicate that Texcom agrees with the proposed changes and state in the comment: "Proposed Rule 7.15(b) adequately distinguishes between a self-represented fiduciary who seeks to fulfill a fiduciary duty and a self-represented fiduciary who seeks relief from, or defends against a claim by, a third party."

Neil

From: Ed Corey [mailto:ecorey@weintraub.com]
Sent: Tuesday, May 05, 2009 11:46 AM
To: May Lee Tong; Neil Horton; Margaret Lodise; Peter Stern; Barry Matulich; rehrman@thoits.com; trustlawyer86@yahoo.com
Subject: FW: Fiduciary self representation (adoption of proposed rule 7.15, changes in substitution of attorney forms)

May/Neil et. al. Here is a JC proposal forwarded to me by Doug. It involves Fiduciary Self Representation. Neil addressed this issue previously on behalf of TexCom. Doug asked that the TexCom response come from someone other than me (please see last paragraph). Neil, is this something you would like to address again.

Ed

From: Miller, Douglas C. [mailto:Douglas.Miller@jud.ca.gov]
Sent: Tuesday, May 05, 2009 11:23 AM
To: Ed Corey

Rule Proposal

Rules 7.15, in title 7 of the California Rules of Court, would be adopted, effective January 1, 2010, to read:

Chapter 1 General Provisions

Rule 7.15. Appearances by fiduciaries in civil cases

(a) Definitions

As used in this rule:

(1) "Civil case" has the meaning provided in rule 1.6(3) of these rules.

(2) "Fiduciary" means a person defined in Probate Code section 39 who is a party in a civil case in his or her fiduciary capacity.

(b) Appearances without legal representation

A fiduciary, other than a corporate fiduciary, may appear as a party without an attorney in any proceeding under the Probate Code in which the fiduciary seeks to fulfill a fiduciary duty and neither seeks relief from nor defends against a claim by a third party, on behalf of an estate, trust, conservatee, ward, principal, minor, or any other person of whom the fiduciary is a legal representative.

(c) Appearances with legal representation

Except as provided in (b), a fiduciary who is not an attorney must be represented by an attorney in any civil case, including a proceeding under section 850 of the Probate Code.

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	**Draft 3** **April 17, 2009** **Not Approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
SUBSTITUTION OF ATTORNEY WITHOUT COURT ORDER—CIVIL	CASE NUMBER:

THE COURT AND ALL PARTIES ARE NOTIFIED THAT *(name)*: makes the following substitution:

1. **Former legal representative** ☐ Party represented self ☐ Attorney *(name)*:
2. **New legal representative** ☐ Party is representing self* ☐ Attorney
   a. Name: b. State Bar No. *(if applicable)*:
   c. Address *(law firm name, if applicable, number, street, city, and ZIP)*:
   d. Telephone No. *(include area code)*:
3. The party making this substitution is a ☐ plaintiff ☐ defendant ☐ petitioner ☐ respondent ☐ other *(specify)*:

*** NOTICE TO CERTAIN PARTIES INTENDING TO REPRESENT THEMSELVES:**

- **If you are one of the parties listed below, you should seek legal advice before consenting to represent yourself.**
- If you are a ***guardian ad litem***, a ***corporation***, or an ***unincorporated association***, you may NOT act as your own attorney in most cases.
- If you are an ***attorney-in-fact***, a ***guardian*** of a minor, a ***conservator***, a ***personal representative*** of a decedent's estate (**executor** or **administrator**), or a ***trustee***, you may act as your own attorney in most matters governed by the Probate Code, but you may NOT proceed without an attorney in most other court matters, including some matters governed by that code. See rule 7.15 of the California Rules of Court.

NOTICE TO ALL PARTIES WITHOUT ATTORNEYS

A party representing himself or herself may wish to seek legal assistance. Failure to take timely and appropriate action in this case may result in serious legal consequences.

4. I consent to this substitution.
   Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF PARTY)

5. ☐ I consent to this substitution.
   Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF FORMER ATTORNEY)

6. ☐ I consent to this substitution.
   Date:

(TYPE OR PRINT NAME) (See reverse for proof of service by mail) ▶ (SIGNATURE OF NEW ATTORNEY)

Form Adopted For Mandatory Use
Judicial Council of California
MC-050 [Rev. January 1, 2010]

SUBSTITUTION OF ATTORNEY WITHOUT COURT ORDER—CIVIL
(Miscellaneous)

Code of Civil Procedure, §§ 284(1), 285;
Cal. Rules of Court, rules 3.1362, 7.1151
www.courtinfo.ca.gov

CASE NAME:	CASE NUMBER:

PROOF OF SERVICE BY MAIL
Substitution of Attorney—Civil

Instructions: *After having all parties served by mail with the Substitution of Attorney—Civil, have the person who mailed the document complete this Proof of Service by Mail. An* **unsigned** *copy of the Proof of Service by Mail should be completed and served with the document. Give the Substitution of Attorney—Civil and the completed Proof of Service by Mail to the clerk for filing. If you are representing yourself, someone else must mail these papers and sign the Proof of Service by Mail.*

1. I am over the age of 18 and **not a party to this cause.** I am a resident of or employed in the county where the mailing occurred. My residence or business address is *(specify)*:

2. I served the Substitution of Attorney—Civil by enclosing a true copy in a sealed envelope addressed to each person whose name and address is shown below and depositing the envelope in the United States mail with the postage fully prepaid.

   (1) Date of mailing: (2) Place of mailing *(city and state)*:

3. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME) (SIGNATURE)

NAME AND ADDRESS OF EACH PERSON TO WHOM NOTICE WAS MAILED

4. a. Name of person served:
   b. Address *(number, street, city, state, and ZIP)*:

   c. Name of person served:
   d. Address *(number, street, city, state, and ZIP)*:

   e. Name of person served:
   f. Address *(number, street, city, state, and ZIP)*:

   g. Name of person served:
   h. Address *(number, street, city, state, and ZIP)*:

   i. Name of person served:
   j. Address *(number, street, city, state, and ZIP)*:

   k. Name of person served:
   l. Address *(number, street, city, state, and ZIP)*:

☐ List of names and addresses continued in attachment.

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	**Draft 3 April 17, 2009 Not Approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	CASE NUMBER:
NOTICE OF MOTION AND MOTION TO BE RELIEVED AS COUNSEL—CIVIL	HEARING DATE: DEPT.: TIME: BEFORE HON.: DATE ACTION FILED: TRIAL DATE:

TO *(name and address of client)*:

1. PLEASE TAKE NOTICE that *(name of withdrawing attorney)*:
   moves under California Code of Civil Procedure section 284(2) and California Rules of Court, rule 3.1362, for an order permitting the attorney to be relieved as attorney of record in this action or proceeding.
2. A hearing on this motion to be relieved as counsel will be held as follows:

a. Date:	Time:	Dept.:	Room:

   b. The address of the court: ☐ same as noted above ☐ other *(specify)*:

3. This motion is supported by the accompanying declaration, the papers and records filed in this action or proceeding, and the following additional documents or evidence *(specify)*:

(A memorandum of points and authorities is not required. Cal. Rules of Court, rule 3.1362.)

4. The client presently represented by the attorney is
   a. ☐ an individual.
   b. ☐ a corporation.
   c. ☐ a partnership.
   d. ☐ an unincorporated association.
   e. ☐ a guardian of a minor.
   f. ☐ a conservator.
   g. ☐ a trustee.
   h. ☐ a personal representative of a decedent's estate.
   i. ☐ an attorney in fact acting for a principal.
   j. ☐ a guardian ad litem.
   k. ☐ other *(specify)*:

(Continued on reverse)

Form Adopted for Mandatory Use
Judicial Council of California
MC-051 [Rev. January 1, 2010]

Code of Civil Procedure, § 284;
Cal. Rules of Court, rule 3.1362
www.courtinfo.ca.gov

CASE NAME:	CASE NUMBER:

NOTICE TO CERTAIN CLIENTS CONCERNING LEGAL REPRESENTATION

If this motion to be relieved as counsel is granted, your present attorney will no longer be representing you. If you are one of the parties listed below, YOU SHOULD IMMEDIATELY SEEK LEGAL ADVICE REGARDING LEGAL REPRESENTATION. Failure to retain an attorney may lead to an order striking your pleadings or to the entry of a default judgment against you.

- If you are a ***guardian ad litem***, a ***corporation,*** or an ***unincorporated association***, you may NOT act as your own attorney in most cases.
- If you are an ***attorney-in-fact,*** a ***guardian*** of a minor, a ***conservator***, a ***personal representative*** of a decedent's estate (**executor** or **administrator**), or a ***trustee***, you may act as your own attorney in most matters governed by the Probate Code, but you may NOT proceed without an attorney in most other court matters, including some matters governed by that code. See rule 7.15 of the California Rules of Court.

5. If this motion is granted and a client is representing himself or herself, the client will be solely responsible for the case.

NOTICE TO CLIENTS WHO WILL BE UNREPRESENTED BY AN ATTORNEY

If this motion to be relieved as counsel is granted, you will not have an attorney representing you. You may wish to seek legal assistance. If you do not have a new attorney to represent you in this action or proceeding, and you are legally permitted to do so, you will be representing yourself. It will be your responsibility to comply with all court rules and applicable laws. If you fail to do so, or fail to appear at hearings, action may be taken against you. You may lose your case.

6. If this motion is granted, the client must keep the court informed of the client's current address.

NOTICE TO CLIENTS WHO WILL BE UNREPRESENTED BY AN ATTORNEY

If this motion to be relieved as counsel is granted, the court needs to know how to contact you. If you do not keep the court and other parties informed of your current address and telephone number, they will not be able to send you notices of actions that may affect you, including actions that may adversely affect your interests or result in the loss of your case.

Date:

(TYPE OR PRINT NAME OF ATTORNEY)

(SIGNATURE OF ATTORNEY)

Attorney for *(name):*

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	**Draft 3** **April 17, 2009** **Not Approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	CASE NUMBER:
HEARI **ORDER GRANTING ATTORNEY'S MOTION TO BE RELIEVED AS COUNSEL—CIVIL**	NG DATE: DEPT.: TIME: BEFORE HON: DATE ACTION FILED: TRIAL DATE:

1. The motion of *(name of attorney)*:
   to be relieved as counsel of record for *(name of client)*:
   a party to this action or proceeding, came on regularly for hearing at the date, time, and place indicated above.
2. The following persons were present at the hearing:

FINDINGS

3. Attorney has
   a. ☐ personally served the client with papers in support of this motion.
   b. ☐ served client by mail and submitted a declaration establishing that the service requirements of California Rules of Court, rule 3.1362, have been satisfied.
4. Attorney has shown sufficient reasons why the motion to be relieved as counsel should be granted and why the attorney has brought a motion under Code of Civil Procedure section 284(2) instead of filing a consent under section 284(1).

ORDER

5. Attorney is relieved as counsel of record for client
   a. ☐ effective upon the filing of the proof of service of this signed order upon the client.
   b. ☐ effective on *(specify date)*:
6. The client's ☐ current ☐ last known address and telephone number:

   If the client's current address is known, service on the client must hereafter be made at that address unless otherwise ordered in item 13. If the current address is not known, service must be made according to Code of Civil Procedure section 1011 (b) and rule 3.252 of the California Rules of Court.
7. a. The next scheduled hearing in this action or proceeding is set for *(date, time, and place)*:

   b. The hearing will concern *(subject matter)*:

NOTICE TO CLIENT

You or your new attorney, if any, must prepare for and attend this hearing.

Form Adopted for Mandatory Use
Judicial Council of California
MC-053 [Rev. January 1, 2010]

Code of Civil Procedure., § 284;
Cal. Rules of Court, rules 3.1362, 7.1151
www.courtinfo.ca.gov

CASE NAME:	CASE NUMBER:

8. The following additional hearings and other proceedings (including discovery matters) are set in this action *(describe the date, time, place, and subject matter of each):*

9. The trial in this action or proceeding:
   a. ☐ is not yet set.
   b. ☐ is set for *(specify date, time, and place):*

10. Client is hereby notified of the following effects this order may have upon certain parties.

NOTICE TO CERTAIN CLIENTS CONCERNING LEGAL REPRESENTATION

This motion to be relieved as counsel has been granted. Your attorney no longer represents you.
If you are one of the parties listed below, YOU SHOULD IMMEDIATELY SEEK LEGAL ADVICE REGARDING LEGAL REPRESENTATION. Failure to retain an attorney may lead to an order striking your pleadings or to the entry of a default judgment against you.

- If you are a ***guardian ad litem***, a ***corporation***, or an ***unincorporated association***, you may NOT act as your own attorney in most cases.
- If you are an ***attorney-in-fact***, a ***guardian*** of a minor, a ***conservator***, a ***personal representative*** of a decedent's estate (**executor** or **administrator**), or a ***trustee***, you may act as your own attorney in most matters governed by the Probate Code, but you may NOT proceed without an attorney in most other court matters, including some matters governed by that code. See rule 7.15 of the California Rules of Court.

11. Client is notified that, if the client will be representing himself or herself, the client shall be solely responsible for the case.

NOTICE TO CLIENT WHO WILL BE UNREPRESENTED BY AN ATTORNEY

You will not have an attorney representing you. You may wish to seek legal assistance. If you do not have a new attorney to represent you in this action or proceeding, and you are legally permitted to do so, you will be representing yourself. It will be your responsibility to comply with all court rules and applicable laws. If you fail to do so, or fail to appear at hearings, action may be taken against you. You may lose your case.

12. Client is notified that it is the client's duty to keep the court informed at all times of the client's current address.

NOTICE TO CLIENT WHO WILL BE UNREPRESENTED BY AN ATTORNEY

The court needs to know how to contact you. If you do not keep the court and other parties informed of your current address and telephone number, they will not be able to send you notices of actions that may affect you, including actions that may adversely affect your interests or result in your losing the case.

13. The court makes the following additional orders *(specify):*

Date:

JUDICIAL OFFICER

Item SP09-03 Response Form

Title: Fiduciaries as Parties in Civil Cases (adopt rule 7.15 of the California Rules of Court; revise Judicial Council forms MC-050, MC-051, and MC-053).

☐ **Agree** with proposed changes

☐ **Agree** with proposed changes **if modified**

☐ **Do not agree** with proposed changes

Comments: _____

_____

_____

_____

_____

_____

_____

Name: _____ **Title:** _____

Organization: _____

☐ **Commenting on behalf of an organization**

Address: _____

City, State, Zip: _____

To Submit Comments

Comments may be submitted online, written on this form, or prepared in a letter format. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments. You are welcome to email your comments as an attachment.

Internet: http://www.courtinfo.ca.gov/invitationstocomment/

Email: invitations@jud.ca.gov

Mail: Ms. Camilla Kieliger
Judicial Council, 455 Golden Gate Avenue
San Francisco, CA 94102

Fax: (415) 865-7664, Attn: Camilla Kieliger

DEADLINE FOR COMMENT: 5:00 p.m., Friday, June 26, 2009

Circulation for comment does not imply endorsement by the Judicial Council. All comments will become part of the public record of the proposal.